PETITION FOR A

WRIT OF CERTIORARI

TO THE UNITED STATES

COURT OF APPEALS FOR THE

DISTRICT OF COLUMBIA

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No. 637

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1958

Federal Power Commission, petitioner,

v.

Tuscarora Indian Nation et al.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

✓ J. LEE RANKIN,
Solicitor General,

✓ WILLIAM T. ORMSBEE,
General Counsel,

✓ JOHN C. HOGAN,
Deputy General Counsel,

X LEONARD M. SHAPIRO,
Assistant General Counsel,

✓ JOSEPH B. HOBBS,
Attorney,
Federal Power Commission,
Washington 25, D.C.

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. ——

FEDERAL POWER COMMISSION, PETITIONER

v.

TUSCARORA INDIAN NATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Federal Power Commission, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on November 14, 1958, and modified on March 24, 1959.

OPINION BELOW

The opinion of the United States Court of Appeals is unreported. It is set forth in the Appendix, *infra*, pp. 25–36. The court's order of March 24, 1959, is set forth in the Appendix, *infra*, pp. 36–37.

JURISDICTION

The judgment of the Court of Appeals was entered on November 14, 1958, and modified on March 24, 1959 (Appendix *infra*, pp. 36–37). The jurisdiction

of this Court is invoked under Section 313(b) of the Federal Power Act and 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

A 1950 Treaty between the United States and Canada greatly enlarged the amount of water which the United States may divert from the Niagara River above Niagara Falls for hydroelectric development. In Public Law 85–159, approved August 21, 1957, Congress "expressly authorized and directed" the Federal Power Commission "to issue a license to the Power Authority of the State of New York for the construction and operation of a power project with capacity to utilize all of the United States share of the water of the Niagara River permitted to be used by international agreement," subject to seven specified conditions "in addition to those deemed necessary and required under the terms of the Federal Power Act"; in the event of any conflict, the provisions of Public Law 85–159 were to govern. By order of January 30, 1958, the Federal Power Commission issued a license to the New York Power Authority for the Niagara Project, including a pump-storage reservoir of 60,000 acre-feet capacity. Approximately one-half of the pump-storage reservoir would be located on lands of the respondent Tuscarora Indian Nation.

The questions presented are:

1. Whether Congress, in specifically authorizing the Niagara Project in 1957, granted the Power Authority of the State of New York the right to take lands of the Tuscarora Indians needed for this purpose.

without regard to any otherwise applicable provisions of the Federal Power Act limiting the use of Indian lands.

2. Assuming that the general limitations of the Federal Power Act are applicable, whether the Tuscarora lands sought to be used for the pump-storage reservoir constitute a "reservation" within the meaning of Section 4(e) and Section 3(2) of the Federal Power Act, so that the Niagara Project license within such areas must be based upon a finding that it will not interfere or be inconsistent with the purpose of the reservation.

3. Whether the Court of Appeals has exceeded its power and usurped an administrative function by directing the Federal Power Commission to amend its licensing order so as to exclude Tuscarora lands, instead of remanding the case to the Commission for its consideration of any further steps required in the public interest in the light of the decision of the Court of Appeals.

STATUTES INVOLVED

The provisions of Public Law 85–159, 71 Stat. 401, approved August 21, 1957, and pertinent provisions of the Federal Power Act, 49 Stat. 838, 16 U.S.C. 791a, *et seq.*, are set forth in the Appendix, *infra*, pp. 56–62.

STATEMENT

Respondent Tuscarora Indian Nation filed a petition in the Court of Appeals for the District of Columbia Circuit, under Section 313(b) of the Federal Power Act, to review the Federal Power Commission's

order of January 30, 1958 (R. 1)[1] issuing a license to the Power Authority of the State of New York for the construction and operation of the Niagara Project with capacity to utilize all of the United States share of the water of the Niagara River permitted to be used by international agreement. The Court of Appeals, after some intermediate proceedings, sustained the objections of the Tuscaroras. The pertinent facts and proceedings are as follows:

1. The power plant of the proposed Niagara Project will be the largest hydroelectric project in the United States, costing more than $700,000,000. Its planned capacity was 2,190,000 kilowatts, with an annual production of 13,000,000,000 kilowatt hours. To achieve this, the project works include a pump-storage reservoir with a capacity of approximately 60,000 acre-feet. Although the Power Authority had not been permitted to survey Indian lands, it was estimated at the time of the first hearing before the Commission on the application that the pump-storage reservoir would utilize approximately 1,000 acres of lands of the Tuscarora Indian Nation. The remainder of the reservoir would be located on lands in the Town of Lewiston. The Tuscarora Indian Nation objected to the use of any of its lands for reservoir purposes and the Town of Lewiston objected to the use of about 720 acres within the town.

The maps and drawings submitted by the Power Authority at the first hearing showed lands in addition to those owned by the Tuscarora Indian Nation.

[1] "R." refers to the printed Joint Appendix in the court below; and "T." refers to the original record filed with that court.

The Commission found that a reservoir of the proposed capacity (60,000 acre-feet) was required to utilize properly the water resources involved, but it assumed that additional lands in the area would be available for reservoir purposes in the event the Power Authority would be unable to acquire the Indian lands (R. 8). However, the location of Indian lands and their topography made them the best suited of any lands that might be available for reservoir purposes. In its order denying the application of the Tuscarora Indian Nation for rehearing, the Commission specifically found that the best location of the reservoir would require approximately 1,000 acres of land owned by the Tuscarora Indian Nation. The Tuscaroras' objections were overruled (R. 26).

2. The Commission's other relevant findings with respect to the Niagara Project are these: The Niagara River carries the surplus water of the upper Great Lakes seaward from Lake Erie to Lake Ontario. The mean flow of the river is about 200,000 cubic feet per second and because of the immense storage capacity of the upper lakes the flow is remarkably steady. While the 1909 Treaty with Canada limited diversions from the Niagara River to 36,000 cubic feet per second by Canada and 20,000 cubic feet per second by the United States, the 1950 Treaty with Canada greatly enlarged the permissible diversion. It provides for a flow over the Niagara Falls of 100,000 cubic feet per second in the daytime and early night hours during the tourist season, and 50,000 cubic feet per second at other times. The water in excess of the 1950 Treaty requirements

for flow over the Falls is divided equally between the United States and Canada for power purposes. 1 U.S.T. 694.[2]

The Niagara River drops from a mean elevation of 572 feet above sea level at Lake Erie to 246 feet at Lake Ontario. The total length of the river is 36 miles, but because of the nature of the geological formation about half of the drop of 326 feet occurs at the Falls and an additional 140 feet in the rapids immediately above and below the Falls. The "head" created by this concentration of falls and rapids in a relatively short distance, combined with the large and steady flow of the river, and its proximity to markets, makes the Niagara site one of the world's largest and most economical for hydroelectric development. Due to its high head, the water available has a potential of more than twice the power capacity of the St. Lawrence site recently developed downstream.

Practical methods for full utilization of the water available to the United States at Niagara Falls have been the subject of study for years and more especially since large additional diversions were authorized by the 1950 Treaty with Canada. Plans for the

[2] Based on a reservation in the Senate consent to ratification of the 1950 Treaty, the Commission dismissed the Power Authority's original application for a license under Section 4(e) of the Federal Power Act. The order dismissing the application was reversed and remanded by the court below. *Power Authority of New York* v. *Federal Power Commission*, 247 F. 2d 538 (C.A.D.C.). This Court vacated the judgment of the Court of Appeals as moot after enactment of Public Law 85-159. *American Public Power Assoc. et al.* v. *Power Authority of New York*, 355 U.S. 64.

essential facilities had been developed prior to June 7, 1956, when a rock slide partially destroyed the existing Schoellkopf power plant immediately below the Falls. Up until that time it had been assumed that the use of 20,000 cubic feet of water per second would continue through the Schoellkopf plant, which was operated under a Federal Power Commission license held by Niagara Mohawk Power Corporation. After the rock slide, and prior to the consideration by Congress of the special legislation in 1957, it was evident that the entire diversion permitted in the United States could and should be utilized by the project to be licensed at Lewiston. The plans underwent their last major revision after the rock slide, for the substantial quantity of water thereby made available for use through the Lewiston plant accentuated the value of a pump-storage reservoir as a means of increasing the dependable capacity of the Lewiston plant during the hours of heaviest power demand and necessitated an increase in the size of that reservoir to take advantage of the full potentialities. See also *infra*, pp. 15–17.

The superiority of the Lewiston site—proposed to be used by the New York Power Authority—is that it permits the development of the full power potential from the water available, including the development of additional head created by the rapids in the Niagara River downstream from the Schoellkopf plant. In addition, Lewiston is the only site where a pump-storage reservoir is feasible. In order to obtain a

dependable capacity of 1,800,000 kilowatts, a pump-storage reservoir of at least 60,000 acre-feet capacity is essential. The function of the pump-storage reservoir is to store water when the power load is low and to make it available for use when power is needed. Due to the Treaty requirements, the volume of water available for power generation is greater during the night than in the daytime during the tourist season. The need for power, on the other hand, is greater during the daytime than at night, and is greater during weekdays than on Saturdays and Sundays. Water not required for the power load can be stored by pumping it into a suitable reservoir during the nighttime and over the weekends. The stored water can then be withdrawn from the reservoir and used to generate power during periods of high power load. As indicated above the storage capacity required to utilize fully the water of the Niagara River permitted by international agreement was found by the Commission to be at least 60,000 acre-feet (T. 8574).[3] By utilizing all of the available water for its most beneficial purposes the cost per unit of power output is thereby reduced, per-

[3] Contrary to the impression of the court below, as expressed in its opinion of November 14, 1958 (App., *infra*., p. 29), the studies which had been reported to Congress prior to the passage of Public Law 85-159 provided for pump-storage reservoirs of various capacities. (See S. Doc. No. 113, 84th Cong., 2d Sess., p. 36; and H. Rept. No. 862, 85th Cong., 1st Sess., p. 6). However, all of the reservoirs proposed prior to June 7, 1956, were smaller than the reservoir proposed by the Power Authority after the rock slide which made the 20,000 cubic feet per second available for more complete utilization at Lewiston. See *infra*, pp. 15-17.

mitting it to be sold at the lowest rates reasonably possible in compliance with Public Law 85–159 (App., *infra*, pp. 56–60).

3. In its opinion and interim judgment entered November 14, 1958, the Court of Appeals held that Public Law 85–159 did not constitute Congressional consent or authorization for the taking of the Tuscarora Indian lands for the Niagara Project. Turning to the authority available under the Federal Power Act, the court held that these Indian lands are "reservations" of the United States within the meaning of Section 4(e) of the Federal Power Act (App., *infra*, pp. 60–61), and that the first proviso of Section 4(e) requires a finding by the Commission that the license will not interfere or be inconsistent with the purposes for which the Tuscarora Indian Reservation was created or acquired, as a prerequisite to the validity of a license authorizing their condemnation. The court remanded the case to the Commission to explore the possibility of making that finding, expressly retaining jurisdiction and requiring that the Commission report to the court its action pursuant to the remand.

4. The Commission held extensive hearings pursuant to the remand, exploring not only the possibility of making the required finding but also the possibility of removing the pump-storage reservoir from Indian lands. On February 2, 1959 (App., *infra*, pp. 38–48), the Commission found that the license, insofar as it includes lands of the Tuscarora Indian Nation, will interfere and be inconsistent with the purpose for which the Tuscarora reservation was created or ac-

quired. But it also found from the whole record that a pump-storage reservoir with a usable storage capacity of 60,000 acre-feet is essential to the utilization of the United States share of the water resources, as required by Public Law 85–159. The Commission pointed out that severe community disruption, unreasonable expense, and substantial delay would be caused by the flooding of part of the Town of Lewiston and, absent any feasible alternative, declared that removal of the reservoir from Indian lands would reduce storage capacity to 30,000 acre-feet, and result in a loss of one-sixth the dependable kilowatt capacity of the Project (T. 8574, App., *Infra*, pp. 39–40).

5. The Commission's findings of February 2, and its order of February 25, 1959 (App., *infra*, pp. 49–56), denying the application of the Power Authority for rehearing, were transmitted to the Court of Appeals. Upon various motions of the parties, the court entered its final order and judgment on March 24, 1959, approving the license except in so far as it would authorize the condemnation of Tuscarora lands for reservoir purposes, and remanding the case to the Commission with instructions to amend the licensing order so as to exclude specifically any such condemnation power (App., *infra*, pp. 36–37).

REASONS FOR GRANTING THE WRIT

This is a case of substantial national importance. The decision below, if unreversed, will undoubtedly compel a drastic reduction in the dependable capacity of the vast Niagara hydroelectric project, which will be the largest in the country. This result will

frustrate Congress' direction to utilize all of the United States share of the Niagara River water acquired by international agreement with Canada, and will thwart the full development of a vital national resource, upon which a great industrial area depends. This is so because the plain fact is that lands of the respondent Indian Nation are necessary for the project as contemplated by the Power Authority and licensed by the Commission, and it now appears clear that those lands cannot reasonably be acquired except through condemnation.

In its interim decision, the Court of Appeals stated that the Indian lands were not necessary and that, with some additional expense, the same size reservoir could be located elsewhere (App., *infra*, p. 35). But the Commission, upon remand, found that higher dikes alone were not feasible and that the alternative flooding of the Lewiston town site could not be approved. It anticipated that a removal of the reservoir from Indian lands, cutting down its area, would reduce the dependable capacity of the project by one-sixth, a loss of 300,000 kilowatts of capacity. While the New York Power Authority has since applied to amend its license, redesign the reservoir, and avoid part of this loss,[4] a serious detriment is unavoidable.

[4] The Power Authority's application was filed March 2, 1959, and has not yet been acted upon by the Commission. It proposes changes which would result in a pump-storage reservoir with a 45,000 acre-feet capacity. The license calls for 60,000 acre-feet while the elimination of Indian lands without the proposed changes would reduce the reservoir size to 30,000 acre-feet.

The Court of Appeals reached its result on the theory that the lands owned by the Tuscarora Nation could not be utilized without fulfilling the requirements governing the taking of a "reservation" under Section 4(e) of the Federal Power Act. We submit that Public Law 85–159, specifically authorizing the Niagara Project, superseded any limitations in the Power Act which conflict with the direction to utilize all the available water for power purposes, and that Congress has necessarily authorized the taking of these lands by eminent domain. On this point, the decision below is in direct conflict with the views of the Second Circuit, expressed in a suit dealing with condemnation of the Tuscarora lands. *Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d 885 (C.A. 2), certiorari denied, 358 U.S. 841.

Furthermore, even if the Section 4(e) limitation were applicable to the Niagara Project, we submit that lands owned in fee by an Indian Nation do not constitute a "reservation" under the special meaning of that term in the Federal Power Act and, hence, may be condemned like ordinary private lands, under Section 21 of that Act.

I

1. The judgment of the court below would preclude the Commission from issuing a license to the New York Power Authority for the construction and operation of the complete comprehensive project expressly authorized and directed by Public Law 85–159 (App., *infra*, pp. 56–60). As the Second Circuit observed, the direction to the Commission "was specific

namely, 'to issue a license to the Power Authority of the State of New York for the construction and operation of a power project with capacity to utilize all of the United States share of the water of the Niagara Power permitted to be used by International agreement.'" *Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d 885, 894, certiorari denied, 358 U.S. 841. On this issue the Second Circuit's ruling is in direct conflict with the holding below.

Contrary to the opinion below (App., *infra*, pp. 29–30), Congress did not merely specify some details of the Niagara Project, leaving the remainder to the ordinary criteria. Adopted after hearings which set forth the proposed plans, Public Law 85–159 named the licensee and set forth the objective of full utilization, *i.e.*, the development of the full power potential of the river waters available to the United States. Cf. H. Rept. No. 862, 85th Cong., 1st Sess., pp. 6–7; and S. Rept. No. 539, 85th Cong., 1st Sess., pp. 5–6. It also established the superiority of these provisions (and others) over any inconsistent terms of the Federal Power Act. Section 2 of Public Law 85–159 (App., *infra*, pp. 59–60) states that the Commission is instructed to follow its regular procedures in issuing the license but that "in the event of any conflict, the provisions of this Act shall govern in respect of the project herein authorized." Cf. H. Rept. No. 862, 85th Cong., 1st Sess., p. 11.

Moreover, Section 1(b) of Public Law 85–159 (App., *infra*, p. 56) makes applicable to the license for the Niagara Project seven specified "licensing conditions, in addition to those deemed necessary and re-

quired under the terms of the Federal Power Act * * *." The licensing "conditions" of the Federal Power Act are set forth in its Section 10, 16 U.S.C. 803 (App., *infra*, pp. 61–62); consequently, the only conditions under the Federal Power Act which may be deemed necessary and required for the Niagara Project are those applicable under Section 10, and not inconsistent with Public Law 85–159. But the limitation on the utilization of land in a "reservation" is contained in Section 4(e) of the Federal Power Act, not Section 10, and even if otherwise applicable, was necessarily superseded by Public Law 85–159.

Section 4(e) requires that licenses for projects within a "reservation" shall be issued only after a finding "that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired * * *". But where Section 4(e) applies, the Commission has authority not only to issue a license but to refuse to issue it if the necessary finding cannot be made. Here, however, authority to refuse the Power Authority's license, or to limit it to partial utilization of the Niagara River waters, was withdrawn by Congress when it enacted Public Law 85–159. There was no more authority reserved to the Commission to determine that the designated project would interfere with a reservation than for the Commission to determine that only part of the available water should be utilized, or that the pump-storage reservoir should be eliminated altogether, or that the license should be issued to another applicant.

In short, under the terms of Public Law 85–159, the Power Act's Section 4(e) finding, required by the court

below, cannot stand as a bar to the licensing and construction of the comprehensive water-power development specifically directed by Congress in 1957.

2. To support its view of the Congressional purpose in Public Law 85–159, the Court of Appeals indicated that no storage reservoir was discussed before passage of the bill (App., *infra*, p. 29). This is erroneous. The Second Circuit has pointed out that the plans presented to Congress included a pump-storage reservoir. *Tuscarora Nation of Indians* v. *Power Authority*, *supra*, 257 F. 2d at pp. 893–894. This was true even before the Schoellkopf plant was destroyed (*supra*, pp. 6–9 and fn. 3); thereafter, the importance of the reservoir was greatly enhanced, since an additional flow of 20,000 cubic feet of water per second could be added to the new Niagara Project.

Immediately after the Schoellkopf destruction, a hearing was held on June 28, 1956, by the House Committee on Public Works on the Niagara redevelopment bills, S. 1823 and H.R. 11477, 84th Cong., 2d Sess., and the Power Authority made further engineering studies on utilization of the entire diversion. An outline of the revised plan showing the general location of the principal project works, including an enlarged pump-storage reservoir, was given in the 26th Annual Report of the Power Authority, dated January 28, 1957. In addition to showing the general location of the proposed enlarged project works, this report (pp. 12–13, 38–43; T. 7897–7898, 7923–7928) gave a brief description of the proposed project, including the installed capacity of 2,190,000 kilowatts with a dependable capacity (firm power output) of 1,800,000

kilowatts (T. 7923) which could only be achieved through the use of the pump-storage reservoir. This is the report and the revised plan which was approved by the Senate and House Committees reporting the Niagara redevelopment bill which became Public Law 85–159 on August 21, 1957.[5] The maps showing the location of the reservoir included lands here in suit, owned by the Tuscarora Nation.[6]

[5] The Niagara redevelopment bill was reported out June 27, 1957 by the Senate Committee on Public Works (S. Rept. No. 539, 85th Cong. 1st Sess.) with this statement (p. 6):

> There is no controversy as to the most desirable engineering plan of development. Studies and plans for the project have been made by the Corps of Engineers, the Bureau of Power of the Federal Power Commission, the Niagara Mohawk Power Corporation, and the Power Authority of the State of New York. *The latter organization having made the more recent studies which have taken into account the loss of capacity caused by the collapse in 1956 of the Schoellkopf station.* [Emphasis added.]

The full capacity proposed by the Power Authority was accepted by the House Committee on Public Works in its report of July 23, 1957 (H. Rept. No. 862, 85th Cong. 1st Sess., p. 7):

> As a result of the disaster, the redevelopment project will be enlarged so as to develop the water formerly utilized in the destroyed plant. The proposal now contemplates a project with a total installed capacity of 2,190,000 kilowatts. Of this 1,800,000 will constitute firm power on a 17-hour-day basis. It is anticipated that in order to achieve this amount of firm capacity, pump-storage and pumping-generating facilities will be required. * * *

[6] On the papers before Congress, there was no indication of the ownership of the project lands, except that it was noted that part of the lands were owned by Niagara Mohawk Power Corporation, which had operated the Schoellkopf Plant. No representations had been then made by the Indians and there was no reason to believe that any problem would arise with respect to the condemnation of the lands.

Referring to the legislative background, the Second Circuit held that Congress in Public Law 85–159 impliedly authorized the taking of the Tuscarora lands. Because of the size and extent of the project, the contemplated necessity for a pump-storage reservoir, and the proximity of the Indian lands, the likelihood that these lands would be taken was found within the Congressional knowledge and intent. *Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d at pp. 893–894. We submit that this ruling was sound and that the court below erroneously found no such consent or authorization by Congress.

3. Public Law 85–159, therefore, precluded any application of Section 4(e) of the Power Act to the Indian lands required by the Niagara Project. In addition, Public Law 85–159 constituted the federal approval needed for alienation of Indian lands. Congress can take such lands by eminent domain and it may do so by its authorization of projects extending to those lands, even without specifically designating Indian lands as its object. *Henkel* v. *United States*, 237 U.S. 43; *Spalding* v. *Chandler*, 160 U.S. 394; *Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U.S. 641; *Seneca Nation* v. *Brucker*, 262 F. 2d 27 (C.A.D.C.) pending on petition for writ of certiorari, No. 860, this Term; *United States* v. *21,250 Acres of Land*, 161 F. Supp. 376 (W.D.N.Y.); *United States* v. *5,677.94 Acres of Land*, 152 F. Supp. 861, 162 F. Supp. 108 (D. Mont.). See Brief for the Respondents in Opposition, *Seneca Nation* v. *Brucker*, No. 860, this Term, at pp. 5–6. The wisdom of Congress in determining the use of the water resources here involved

is not subject to review (*Oklahoma* v. *Atkinson Co.*, 313 U.S. 508); nor is the Commission's determination as to the necessity for a pump-storage reservoir located, in part, upon Tuscarora lands (*Chapman* v. *Federal Power Commission*, 345 U.S. 153, 171).

II

Even if Section 4(e) of the Power Act (App., *infra*, pp. 60–61) is fully applicable to the Niagara Project, it does not protect the Indian lands here involved. The Second Circuit briefly set out the history of the Tuscarora Nation, and pointed out that the tract sought for the reservoir is owned by the tribe in fee and was purchased by it from the Holland Land Company in 1804, title being finally taken in 1809. *Tuscarora Nation of Indians* v. *Power Authority, supra*, 257 F. 2d at 887. While the manner of acquisition and holding may not be pertinent to the statutes restricting alienation of Indian lands, as the Court of Appeals stated (App., *infra*, pp. 26–27), an entirely different question is presented here—whether these lands constitute a "reservation" under the special provisions of Section 4(e) of the Power Act. We submit that the term "reservation" in that Act comprehends only lands owned in fee by the United States, or in which the United States has a real property interest, and, therefore protects only Indian tribal lands held in trust by the United States or in which the United States has some property interest.[7]

In the first place, Section 4(e) refers to "the public lands and reservations *of the United States*" (empha-

[7] The majority of Indian lands in the United States consist of government lands held in trust for the Indians under treaty and statutory provisions.

sis added), and thus limits the term "reservation", for Power Act purposes, to those reservations which may properly be deemed to belong to the United States. Secondly, there is a special definition of "reservation" in the Power Act which carries the same connotation. Section 3(2) provides:

> "reservations" means national forests, tribal lands embraced within Indian reservations, military reservations, and *other* lands and interests in lands *owned by the United States*, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks:[8] [Emphasis added.].

Under this definition, to constitute a "reservation" the lands must be "owned by the United States" and dedicated to certain uses, either as national forests, military reservations, or as an Indian reservation, in which tribal lands are protected.

Our view that federal ownership is fundamental is also shown by other provisions of the Power Act. The Act contemplates that *private* lands will be taken by eminent domain under Section 21. However, federal lands including Indian "reservations" are not to be condemned. Rather, under Section 10(e), the licensee pays an annual rent charge to the United States.[9]

[8] Section 3(1) defines "public lands" as "such lands and interest in lands owned by the United States as are subject to private appropriation and disposal under public land laws. It shall not include 'reservations', as hereinafter defined;".

[9] Where the reservation involved is an Indian reservation, Section 10(e) makes the amount of the charge subject to the approval of the Indian tribe, but the payment is still made to

The distinction rests on the fact that, since the "reservation" is already government-owned land, no condemnation is necessary to obtain title and make it available for hydroelectric development. On the contrary, in the instant case it has been recognized from the outset that the taking of an interest in the Tuscarora lands by eminent domain will be required in order to proceed with the project.[28] This acceptance by all parties of the propriety and need for condemnation is based upon the fact that the lands are owned in fee, and an annual charge under Section 10(e) would be entirely inappropriate. By the same token, the lands are not a "reservation," for Power Act purposes, requiring special treatment under Section 4(e).

The term "reservation" is likewise used by the Power Act, in describing the jurisdictional bases for the issuance of licenses, so as to indicate that federally-owned lands alone are meant. Section 4(e) opens with the general authorization to license hydroelectric and other facilities "in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and *reservations of the United States* (including the Territories), or for the

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the United States, in trust, because the Section deals with federal lands in trust.

The approval of the Indian tribe need be had under Section 10(e) only if the tribe has organized as permitted by Section 16 of the Act of June 18, 1934, 25 U.S.C. 476. The Tuscarora Nation has not so organized (T. 8201).

[28] The interest taken should be that interest best adapted to both the execution of the project and the protection of the rights of the Indians.

purpose of utilizing the surplus water or water power from any Government dam * * *" (Emphasis added.) This Court pointed out in *Federal Power Commission* v. *Oregon*, 349 U.S. 435, 443, that the Act's licensing power "in relation to public lands and *reservations of the United States* springs from the Property Clause" of the Constitution—Article IV, Section 3. (Emphasis added.) The Court thus demonstrated its understanding that lands, to qualify as a "reservation" under the Power Act, must constitute federal property. Any dealings with Indian lands such as the Tuscarora property here involved would necessarily have been based upon the power to regulate commerce, including commerce with Indians, rather than upon the property clause of the Constitution.

This conclusion was further spelled out in *Federal Power Commission* v. *Oregon, supra,* when the Court referred to the difference in "established meaning" of the terms "public lands" and "reservations". The former were federal lands subject to appropriation and disposal under the public land laws; the latter were not so subject. In other words, a "reservation" consists of federal lands of a certain type, dedicated to a certain purpose. 349 U.S. at 443–444. The Federal Government's guardianship interest in the Tuscarora Indians, and restrictions upon alienation arising from federal law, do not constitute an interest of the United States in the tribe's lands sufficient to make them public or publicly-owned lands for the purposes of the Power Act. The Tuscarora lands cannot, therefore, constitute a "reservation" within the special meaning of the Power Act.

Finally, the interest of federal guardianship over Indians does not require the application of Section 4(e) to such property of an Indian tribe. The protection against improvident alienation remains in the requirement of federal approval; this approval is here contained in Public Law 85-159 and in Section 21 of the Power Act, authorizing the taking of lands needed for a federal power project. Where the United States or a federal licensee acquires the property, just compensation is assured by the provisions of the Fifth Amendment and also by Section 21, which expressly provides for condemnation proceedings by a licensee to acquire non-federal lands necessary for an authorized project. This is the measure of guardianship protection given under Section 21 by the Second Circuit in *Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d 885, certiorari denied, 358 U.S. 841. To extend the interpretation of the term "reservations" in Section 4(e) of the Power Act is not justified by the other provisions of that statute.

III

As we have shown, the Court of Appeals erroneously invalidated the license issued to the Power Authority to the extent that the license authorized the condemnation of the lands of the Tuscarora Indians. This error was compounded when the court remanded the case to the Commission with instructions to amend its order "so as to exclude specifically the power of the said Power Authority to condemn

the said lands of the Tuscarora Indians for reservoir purposes" (App., *infra*, p. 37).

As this Court held in *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20–21, the power of the Court of Appeals "to affirm, modify, or set aside" a Commission order "in whole or in part" does not authorize it to exercise "an essentially administrative function". Its function ends when an error of law is laid bare; the matter must then be returned to the agency for reconsideration.[10]

The order below compels the implementation of a modified license. But under established law it is up to the Commission to determine whether, and to what extent, the project should proceed if Indian lands may not be taken. It must weigh the consequent loss of kilowatt capacity against the Congressional injunction to use the full power potential of the Niagara River waters. It must, under Section 10(a) of the Power Act, decide whether a project with a smaller reservoir is still "best adapted to a comprehensive plan * * * for the improvement and utilization of water-power development, and for other beneficial public uses * * *". This is "an administrative, not a judicial, decision." *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. at 21. Even if the deci-

[10] Cf. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145; *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U.S. 4, 10; *Addison* v. *Holly Hill Co.*, 322 U.S. 607, 618–619; *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 55; and *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 353 U.S. 944; *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 196.

sion below is correct, the court should have gone no further than to remand the case to the Commission for its further consideration.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
SAMUEL D. SLADE,
LIONEL KESTENBAUM,
Attorneys.

WILLARD W. GATCHELL,
General Counsel,
JOHN C. MASON,
Deputy General Counsel,
LEONARD D. EESLEY,
Assistant General Counsel,
JOSEPH B. HOBBS,
Attorney,
Federal Power Commission.

MAY, 1959

APPENDIX

In the United States Court of Appeals for the District of Columbia Circuit

No. 14475

TUSCARORA INDIAN NATION, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

POWER AUTHORITY OF THE STATE OF NEW YORK, INTERVENOR

ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL POWER COMMISSION

Decided November 14, 1958

Mr. Arthur Lazarus, Jr., with whom *Mr. Eugene Grossman* was on the brief, for petitioner.

Mr. John C. Mason, Deputy General Counsel, Federal Power Commission with whom *Mr. Willard W. Gatchell*, General Counsel, Federal Power Commission, and *Mr. Joseph B. Hobbs*, Attorney, Federal Power Commission, were on the brief, for respondent. *Mr. Howard E. Wahrenbrock*, Solicitor, Federal Power Commission, also entered an appearance for respondent.

Mr. Thomas F. Moore, Jr., with whom *Mr. Frederic P. Lee* was on the brief, for intervenor.

Before PRETTYMAN, *Chief Judge*, and EDGERTON and DANAHER, *Circuit Judges*

PRETTYMAN, *Chief Judge*: The issue here is whether the New York Power Authority has a valid license

from the Federal Power Commission to build a dam that will flood certain lands of the Tuscarora Indians. We are of opinion that the case must be remanded to the Federal Power Commission for further consideration. In order that the litigation may not be delayed more than is necessary, we shall state in this memorandum the propositions which lead to our conclusion, without taking the time to complete an opinion in the customary form.

I

The relationship of the United States to the Tuscarora Indians resembles a guardianship, and control over the alienation of their lands is in the United States. A long-existing statute[1] provides "No purchase, grant, lease, or other conveyance of lands * * * from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." [Emphasis added.] The point is further made specific in regard to lands within Indian reservations in the State of New York by a statute adopted by the Congress in 1950,[2] which conferred upon the courts of New York jurisdiction of certain actions involving Indians but contained the proviso "That nothing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands within any Indian reservation in the State of New York." The United States Court of Appeals for the Second Circuit held that the lands involved here are protected by that provision.[3] It makes no difference how

[1] Rev. Stat. § 2116 (1875), 25 U.S.C.A. § 177.

[2] 64 Stat. 845, 25 U.S.C.A. § 233.

[3] *Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d 885.

title to the land may have been acquired by the tribe.[9]

The statement in the letter of the Assistant Secretary of the Interior, referred to in the Commission's order denying rehearing, that these reservation lands are under state jurisdiction, is patently in error insofar as alienation is concerned.

To validate the taking of these lands by the Power Authority of New York for reservoir purposes, the consent of the United States must be found in some manner.

II

We have jurisdiction. The Federal Power Commission issued the license for this project (Project No. 2216, Niagara Project) by an order dated January 30, 1958. It did not in that order designate the land upon which the reservoir here involved should be located.[10] In an order dated May 5, 1958, the Commission approved for inclusion in the license a map showing the location of the project works authorized by the license. The Tuscarora Nation petitioned for

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[9] See *United States* v. *7,405.3 Acres of Land*, 97 F. 2d 417 (4th Cir. 1938); COHEN, FEDERAL INDIAN LAW 321 (4th ed. 1945); 18 OPS. Att'y Gen. 235 (1885). And also see *United States* v. *Candelaria*, 271 U.S. 432 (1926); *United States* v. *Sandoval*, 231 U.S. 28 (1913).

[10] The Commission knew in January of the opposition of the Tuscaroras. The January 30th order recited: "The Tuscarora Indian Nation objects to the use of approximately 1,000 acres of its land for reservoir purposes. The stated reason for its objection is that it wants to remain undisturbed in possession of the land. The lands of the Indian Nation are almost entirely undeveloped except for agricultural use. The Indian Nation states that it will not sell its lands and contends that the Applicant lacks authority to acquire them. However, we do not attempt to pass on that question since other lands are availbale for reservoir use if the Applicant is unable to acquire the Indian lands, although alternative lands may be more expensive."

review of the January order. It did not separately or specifically petition for review of the May order. The Power Authority argues that the only order as to which the Tuscaroras are aggrieved is the May order and that we have no jurisdiction over that order because no appeal was taken from it. We treat the May order as the Commission treated it, *i.e.*, that the map which it approved became a part of the license for the project, which license was issued by the January order. As a matter of fact, some time prior to April 18, 1958, the State of New York, on behalf of the Power Authority, for purposes of condemnation filed with the County Court of Niagara County a map and a description of the project as to which it claimed to be a licensee of the Federal Power Commission, and that map included these Tuscarora lands. The January order of the Commission and all its parts are before us on this petition for review.

III

The Commission was expressly directed by the Congress to issue a license to the Power Authority of New York for the construction of a power project with capacity to utilize all of the United States share of the water of the Niagara River.[5] That statute provided, *inter alia:* "The Federal Power Commission shall include among the licensing conditions, *in addition to those deemed necessary and required under the terms of the Federal Power Act,* the following: [describing seven conditions]." [Emphasis supplied.] Thus the special statute required the Commission to include in the license all those conditions required by the Federal Power Act. The statute (Sec. 2) also required that the rules of practice and

[5] Act of Aug. 21, 1957, 71 STAT. 401.

procedure of the Commission should apply to the granting of the license.

Moreover the record is quite clear that Congress was not advised of the possibility that Indian reservation lands might be sought as the site of part of the project.[6] The Committee reports make no mention of the location of the project works, except, of course, that they would be in this area. During the hearings in 1956, on bills relating to the Niagara power project, witnesses represented to the House Committee that the lands to be acquired for the project belonged to the Niagara Mohawk Power Company. Senator Chavez, Chairman of the Committee in charge of the bill, told the Senate: "No dams or provisions for storage of water are necessary."[7] This testimony related to the project as planned prior to the Schoellkopf disaster, but we are not advised that the impression given was ever withdrawn or changed.

Congress did not by the special statute of 1957 license the Power Authority for this project. It directed the Commission to issue the license. It did not specify the works (dams, reservoirs, etc.) of which the project was to consist or the property upon which the project works were to be located. It left all those matters to the Commission. It did not specify all the licensing conditions; it specified some and left the others to the Commission. It contemplated, and explicitly said, that there would be a proceeding before the Commission in the process of granting the license. We think Congress clearly meant that the license should be issued under the Federal Power Act and according to the terms of that Act; save only that

[6] 103 Cong. Rec. 13194–211, 13364–5, 14437–56 (1957); H.R. Rep. No. 862, 85th Cong., 1st Sess. (1957); S. Rep. No. 539, 85 Cong., 1st Sess. (1957).

[7] 103 Cong. Rec. 14438 (1957).

Congress itself named the licensee, described the scope of the license, and specified seven conditions to be included in the license by the issuing Commission.

As a matter of fact the Federal Power Commission did not understand when it issued its license order of January 30, 1958, that the taking of these reservation lands was necessary for the project or that it was authorizing the taking of such lands. In its order the Commission referred to the objection of the Tuscaroras to the use of their land for reservoir purposes and said: "However, we do not attempt to pass on the question since other lands are available for reservoir use if the Applicant is unable to acquire the Indian lands, although alternative lands may be more expensive."

We conclude on this point that Congress did not in the special statute consent to or authorize the taking of this Indian land for this project.

We have given careful consideration to the possibility that Congress, in adopting the 1957 legislation, was exercising for the United States the totality of its sovereign capacity in respect to this resource, and that the exercise of this power by Congress might be said to be without limitations. This might be in furtherance of a policy of Congress so to govern disposal of rights to develop hydroelectric power that the development would be in the manner the Congress, not an administrative agency or the courts, might select.* Accordingly it might be argued that Congress in the 1957 Act made provision, by a single stroke, for the immediate development by the Power Authority of one of the nation's greatest resources, with all the concomitant factors of necessary works, seizure of prop-

*See *United States* v. *San Francisco*, 310 U.S. 16, 29-30 (1940). Compare *Federal Power Commission* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239, 250 (1954).

erty, and conditions of operation. Of course, had the Federal Government chosen to develop the power through its own plant, it could have done so without the slightest reference to the Power Authority. And, it may be argued, accordingly it did precisely that and the Authority is an agent of the United States as well as of the State of New York. Under that view there need be no reference to Part I of the Federal Power Act and hence none to Section 4(e), much less to Section 3(2). Part I of that Act, in short, might be said to have applicability only in the event that an application by an entity essentially private in origin was made for a license in accordance with the terms of the Act. If Congress, on the other hand, wished to speak directly in the premises—and in behalf of the United States—it was free to do so in complete disregard of limitations to be found in the Act which would apply in the case of others. Such a course, had Congress adopted it, would have the advantage of short-circuiting restrictions and conditions to be found in the Power Act, to the end that the Power Authority might immediately get on with the business.

We have considered that approach, but even as we have considered it we must reject it for we find no escape from the language of the 1957 Act. As we have already pointed out, Congress did not issue a license, it authorized and directed its established agency to issue the license, and the Commission was ordered to include not only specified conditions but also "those * * * required under the terms of the Federal Power Act". Inevitably, therefore, we are bound to revert to the Commission's January order and its order denying the Tuscarora petition for rehearing, pursuant to which the license was to issue. Accordingly, we turn specifically to consideration of

the controlling aspect of the questions before us, namely, whether or not the license might be issued without a Section 4(e) finding. The answer to that question depends in turn upon the meaning of Section 3(2).

IV

The Federal Power Act defines certain words for the purposes of the Act. It provides:[9]

> "[R]eservations" means national forests, *tribal lands embraced within Indian reservations,* military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks. [Emphasis supplied.]

It further provides[10] in pertinent part that "That Commission is * * * empowered * * * [t]o issue licenses * * * for the purpose of constructing * * * reservoirs * * * upon * * * reservations of the United States". Then follows a proviso:

> *Provided,* That licenses shall be issued *within any reservation only after a finding* by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation. [Emphasis ours.]

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[9] Sec. 3(2), 41 STAT. 1063 (1920), as amended, 49 STAT. 838 (1935), 16 U.S.C.A. § 796(2).

[10] Sec. 4(e), 41 STAT. 1065 (1920), as amended, 49 STAT. 840 (1935), 16 U.S.C.A. § 797(e).

The land here in dispute is indubitably "tribal lands embraced within Indian reservations" within the usual meaning of that phrase. But it is argued by the Commission and the Power Authority that the term "reservations" as used in this statute does not include all tribal lands embraced within Indian reservations but only those tribal lands in which the United States owns an interest and which had been withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws. The argument is based upon a construction of the definition in Section 3(2) of the Act. That construction would be that the phrase "owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws" describes all the opening terms in the paragraph—*i.e.*, national forests, tribal lands embraced within Indian reservations, and military reservations. The Commission and the Power Authority say that the United States has and has had no interest in these lands. They point to the fact that this land was acquired by the Tuscaroras by purchase in fee simple with money obtained by them from the sale of land in North Carolina. We think that this reservation is one in which the United States has an interest, and the result here reached must be the same as if the phrase "owned by the United States, [etc.]" were not construed as a limitation upon the terms "tribal lands [etc.]." The money derived from the sale in North Carolina was handled by the United States on behalf of the Indians and was applied by the United States to the acquisition of this land, which adjoined the reservation already owned and occupied by the tribe. We are not alone in concluding that the Tuscaroras' reservation clearly is entitled to the protections accorded without distinction

to Indian tribal lands elsewhere. In *United States* v. *7,405.3 Acres of Land*[11] Judge Parker laid down the doctrine that the guardianship of the United States over the Indians, which includes protection of the Indians from improper alienation of their lands, constitutes sufficient interest in those lands to require congressional expression of the consent of the United States to such alienation. We concur in that view.[12] Whether under the Constitution's "Property" clause, obviously applicable to Government lands, concededly within Section 4(e) of the Act, or under the "Commerce" clause, predicating Section 21 of the Act,[13] the proviso in Section 4(e) requires a Commission finding with respect to the lands in question here.

The argument of the Federal Power Commission and the Power Authority is that the Power Act allows the Commission to deal with federal land (except national forests and monuments) after a Section 4(e) finding. In that section Congress was exercising its constitutional right to dispose of property held by the United States. By Section 21 of the Act, says the Commission Congress, acting under the interstate and foreign commerce clause, allowed the Commission to act in regard to non-federal land. Generally speaking, we agree with the Commission up to this point.

But the application of Section 21 to land held in fee simple by Indian tribes presents a special problem, even if such land be deemed to be non-federal land. Dealings with the Indians are within a special clause

[11] 97 F. 2d 417 (4th Cir. 1938).

[12] We need not go into the complicated ramifications of the nature of Indian reservations depending upon the process of their creation. See, e.g., *United States* v. *Tillamooks*, 329 U.S. 40 (1946); *Sioux Tribe* v. *United States*, 316 U.S. 317 (1942); *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949); *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272 (1955).

[13] 41 STAT. 1074 (1920). 16 U.S.C.A. § 814.

of the Constitution, conferring power on the Congress to regulate commerce with the Indian tribes. The relationship between the United States and members of Indian tribes resembles that of guardian and ward. Alienation of Indian lands, a prerogative of the United States as guardian, requires congressional consent. We do not find congressional consent in the 1957 statute or in any other statute except the Federal Power Act. We do find that, in allowing the Commission under Section 4(e) of the Federal Power Act to deal with "public lands and reservations" as defined in Section 3(2), Congress was exercising not only its power under the property clause of the Constitution but also its power to regulate commerce with the Indian tribes and, therefore, to allow alienation of the land here involved.

V

On the record before us it does not appear that the acquisition of the Tuscarora land is a matter of necessity to the construction of the project to the full extent of its planned scope. The acquisition is desirable solely from the standpoint of economy, apparently acquisition and construction costs would be lower here than at any other place in the area. We fail to find anywhere an inclination of the Congress to save costs to its sole licensee for this enormous power project at the expense of Indians living on an Indian reservation.

VI

We have authority to remand to the Commission for further findings.[14]

[14] *Ford Motor Co.*, v. *Labor Board*, 305 U.S. 364 (1939); *Fleming* v. *Federal Communications Comm'n*, 96 U.S. App. D.C. 223, 225 F. 2d 523 (D.C. Cir. 1955).

VII

We are of opinion that the Commission cannot issue a license for the purpose of constructing a reservoir on these tribal lands embraced within the Tuscarora reservation, unless it can make the finding required by the proviso in Section 4(e) of the Federal Power Act. We will remand the case to the Commission that it may explore the possibility of making that finding. If the Commission concludes that the finding can be made and makes it, or proposes to make it, it will amend its January 30th order to include that finding. We retain jurisdiction of the cause pending receipt from the Commission of notice of its action pursuant to this remand. In order that the litigation may not be prolonged unduly, our remand order will require that the Commission report to us within fifteen days hereafter regarding its action pursuant to the remand.

So ordered.

ORDER

(MARCH 24, 1959)

Before PRETTYMAN, *Chief Judge*, EDGERTON *and* DANAHER, *Circuit Judges, in Chambers*

WHEREAS we held in our opinion filed herein November 14, 1958, that the finding required by Section 4(e) of the Federal Power Act (16 U.S.C. § 797(e), is necessary to the validity of a license purporting to authorize the condemnation of Tuscarora Indian tribal lands, and remanded this case to the Federal Power Commission for further proceedings:

AND WHEREAS on February 2, 1959, after extensive hearings, the Commission, in an opinion and finding, reported to this court that under the facts presented it could not make the finding required:

AND WHEREAS the petitioner subsequently moved for final determination of issues, the respondent moved for reconsideration and for final determination of issues, the intervener moved for renewal of its petition for reconsideration of interlocutory holdings, and the United States, having been admitted as *amicus curiae*, moved for reconsideration and for oral argument, and the court having duly considered the foregoing motions and report of the Commission;

NOW, THEREFORE, IT IS ORDERED by the court that the license issued by the Commission to the Power Authority of the State of New York for the Niagara River Project is approved except in so far as it would authorize the condemnation of Tuscarora Indian tribal lands for reservoir purposes, and further ordered that this case be remanded to the Commission with instructions to amend its licensing order so as to exclude specifically the power of the said Power Authority to condemn the said lands of the Tuscarora Indians for reservoir purposes.

Per Curiam.

Dated: March 24, 1959.

United States of America

Federal Power Commission

Before Commissioners Jerome K. Kuykendall, Chairman; Frederick Stueck, William R. Connole, Arthur Kline and John B. Hussey

Project No. 2216

IN THE MATTER OF POWER AUTHORITY OF THE STATE OF NEW YORK

Opinion No. 317

Opinion and Finding

(Issued February 2, 1959)

We have given further consideration to the license order issued on January 30, 1958 (19 F.P.C. 186) to the Power Authority of the State of New York for the Niagara Falls Project No. 2216 under the Federal Power Act and Public Law 85–159 approved August 21, 1957 (71 Stat. 401) and to the order of March 21, 1958 (19 F.P.C. 362) denying rehearing.

On November 14, 1958, the United States Court of Appeals for the District of Columbia Circuit, in *Tuscarora Indian Nation* v. *F.P.C.* (No. 14475) in a memorandum opinion, remanded the order of January 30, 1958 to the Commission for consideration of a possible finding under Section 4(e) of the Federal Power Act that the license for the Niagara Falls Project will not interfere or be inconsistent with the purpose for which the Tuscarora Indian reservation was acquired. The court allowed fifteen days within which we were to report. This time has been extended by the court, upon our request, so that we might hold hearings and consider the new evidence presented. The hearing commenced on November 24, 1958. The parties con-

curred in omission of the intermediate decision procedure. Proposed findings and conclusions were filed by the parties on December 19, 1958, and we heard oral argument on January 2, 1959.

At the conclusion of the hearings, the Tuscarora Indian Nation and the Power Authority entered into negotiations seeking a settlement of their differences. Although these negotiations were carried on in good faith by both parties they were not successful, and we accordingly are immediately acting, upon being advised by them that further negotiations were impractical.

Since the opinion of the court is not final, we believe it is desirable also briefly to discuss and make findings with respect to other evidence admitted by the examiner.

In our order of January 30, 1958 issuing license after the conclusion of the first hearing, we found that it would be infeasible to reduce the area of the proposed storage by about 720 acres as proposed by the Town of Lewiston and that a pumped-storage reservoir with a usable storage capacity of 60,000 acre-feet and utilizing about 25 feet of drawdown would be required to properly utilize the water resources involved. Although maps and drawings presented at the first hearing showed that it would be physically possible to relocate the pumped-storage reservoir so as to eliminate the Indian lands, and the New York Power Authority so contended, the location of Indian lands and their topography made them the best suited of any lands that might be available for reservoir purposes for the Niagara project.

The record shows, and we now find, that the use of other lands in lieu of Indian lands for pumped-storage reservoir purposes would cause a substantial

delay in construction; would result in severe community disruption; would separate parts of the Town of Lewiston by a large body of water which could not be bridged; would call for the rerouting at unreasonable expense of main highway and railroad tracks, and disrupt school transportation, sewage, domestic water supply, fire protection and civil defense activities; would require the removal of approximately 450 homes and two cemeteries and call for the destruction of a new school costing over a million dollars.

We also find from the whole record that a pumped-storage reservoir with usable storage capacity of 60,000 acre-feet is required to utilize all of the United States' share of the water of the Niagara River made available by international agreement, a requirement expressly imposed by Congress in the Act of August 21, 1957, Public Law 85–159. A pumped-storage reservoir of smaller area with usable storage capacity of 60,000 acre-feet utilizing higher dikes and a drawdown of more than about 25 feet is technically infeasible and is economically undesirable. The removal of the pumped-storage reservoir from Indian lands by reducing the area of the reservoir would reduce the usable storage capacity from 60,000 acre-feet to 30,000 acre-feet resulting in a loss of about 300,000 kilowatts of dependable or a reduction of about one-sixth of the total dependable capacity of the Niagara Project.

Since the Court of Appeals for the District of Columbia has found our conclusion that there was no necessity for a finding under Section 4(e) to be erroneous, we now proceed to the task assigned us by the court.

We find that the Tuscarora Indian Nation comprises 6,249 acres of land and is situated in the County of Niagara in the State of New York and that the

Tuscarora Nation of Indians has continuously resided on the reservation for more than 150 years. The Power Authority of the State of New York seeks to acquire 1,383 acres of land within the reservation for use as a reservoir site. This land and other land contiguous to it were acquired by the Tuscarora for a homeland and a place to live and for farming and related uses. The Tuscarora had left North Carolina and gone to this land in the State of New York.

There are more than 600 Indians presently residing on the reservation and there are 37 homes which are occupied by more than 175 persons within the proposed reservoir site. The construction of the proposed reservoir would inundate or make unusable approximately 22 percent of the entire Tuscarora reservation. In our opinion the fact that the Indians who would be displaced could find room on other parts of the reservation is immaterial because it is entirely possible that the number of Tuscarora desiring to use reservation lands will increase in the future.

The possibility that the displaced Tuscarora could relocate on other lands now not a part of, but contiguous to the reservation is immaterial. Such an arrangement would seem to provide an equitable solution to the problem, but would not alter the fact that the taking of the 1,383 acres of Tuscarora lands would interfere and would be inconsistent with the purpose for which the reservation was created or acquired.

We, therefore, find that the license issued herein insofar as it includes lands of the Tuscarora Indian Nation will interfere and will be inconsistent with the purpose for which such reservation was created or acquired.

We realize that this finding will result in a higher cost for the electricity to be generated by this project,

and that in the event it is not economically feasible to substitute other lands as a reservoir site, will result in a plan not best adapted to the comprehensive development of the Niagara River for power and other purposes. Accordingly, we regret that we have not been able to reach any other solution. However, we cannot permit our judgment to be swayed by our personal views of what is desirable but must administer the laws as passed by the Congress and as interpreted by the courts. No other finding may be reached by us under the evidence.

Since this is a final order insofar as this Commission is concerned, the parties have a right to petition for rehearing under the provisions of Section 313(b) of the Federal Power Act in the event they disagree with our conclusions and wish to appeal therefrom, and for this reason we are at this time certifying to the court only a copy of this opinion and finding and are retaining the record made at the hearings.

By the Commission. Commissioners Stueck and Connole dissenting.

/s/ J. H. Gutride,
JOSEPH H. GUTRIDE,
Secretary.

CONNOLE and STUECK, Commissioners, *dissenting:*

We have been asked by the United States Court of Appeals for the District of Columbia to explore the possibility of making a finding that the storage reservoir of the Niagara River Power Project can be constructed on the tribal lands embraced with the Tuscarora Reservation without interfering or being inconsistent with the purpose for which that Reservation was created or acquired. Majority have completed their exploration and return to the Bench with empty hands. The expedition into the legal jungle has been fruitless.

As a result a seven hundred million dollar project,[1] financed by lending institutions, insurance companies and the savings of private citizens, through bond issues, hangs as near the edge of disaster today as did the ill-fated Shoellkopf plant on June 7, 1956, just before it crashed to destruction in the Niagara Gorge. That disaster gave such urgency to this project that every partisan and selfish interest but one was forgotten in the pressing need for power. Yet, because one interest persists, "the largest hydro-electric project in the United States" as the Second Circuit described it,[2] may never be built for want of a finding, the need for which should never have arisen in the first place.

And the pity is, the finding not only can and in common sense should be made, if is legally compelling that such a finding be made. The business of this separate statement is to show why and how, in barest outline, that is so.

It is unimportant whether we agree with the conclusion that the proviso in Section 4(e) requires a Commission finding with respect to the lands in question here. What is important is the conclusion by the United States Court of Appeals for the District of Columbia: "We do find that, in allowing the Commission under Section 4(e) of the Federal Power Act to deal with 'public lands and reservations' as defined in Section 3(2). Congress was exercising, not only its power under the property clause of the Constitution but also its power to regulate commerce with the

[1] Including interest charged construction, land rights and reimbursement to Federal Government and to municipalities.

[2] *Tuscarora Nation of Indians* v. *Power Authority of the State of New York*, C.A. 2, Docket No. 25236, July 24, 1958.

Indian tribes and, therefore, *to allow alienation of the land here involved.*"[3] [Our emphasis.]

The controlling importance of this conclusion rests in its concession that alienation of part of a reservation subject to Section 4(e) of the Federal Power Act, is not *per se*, and as a matter of law, inconsistent with the purposes for which the reservation has been created.

Majority's position fails, we think, for two reasons. First, it confuses the means to achieving the end for which the reservation was created with the end itself. Second, it too narrowly construes the purpose for which the reservation was created.

The purpose for which this and any other Indian reservation is created is to assure a peaceful, reasonably comfortable and secure life for the tribes. In that fashion they are compensated for the means of maintaining a livelihood of which they had been deprived elsewhere. The ownership, occupancy and use of land is a means to that end. Particularly in the agrarian society prevailing in early 19th century America, land was a *sine qua non* to achieving that end.

Ownership of land was not an end in itself, however. In that respect, the physical thing comprising the reservation served the same purpose as the more metaphysical things such as exemption from certain state laws, and wardship status under the guardianship of the Secretary of the Interior. The reservations were not created to make land companies out of Indian tribes. Ownership, occupancy and use of land never should be elevated to a status more important than the end or purpose for which that ownership was designed. If called upon to measure whether the end

[3] *Tuscarora Indian Nation* v. *F.P.C.*, C.A.D.C., No. 14475, decided November 14, 1958, slip sheet opin. p. 11.

for which a reservation has been created will be furthered or frustrated by a proposed activity, then, we must not ask ourselves simply whether that activity will deprive the Indians of land. Rather we must inquire whether the proposed activity will interfere or be inconsistent with the assurance to the Indians of a peaceful, reasonably comfortable and secure life. Continued ownership, occupancy and use of the land given to or acquired by the Indians may or may not carry with it such an assurance. Indeed it is not difficult to imagine conditions under which continued ownership, occupancy and use of lands originally used by the Indians as a means to such end might be the worst thing for them. For example, if the location were endangered by radioactive fallout from nuclear explosion.

Certainly, we think, if the physical occupation of part of the land, the covering of it with some 65 feet of water, is all that we are to consider we are never to answer this problem. The District of Columbia Circuit knew that these lands would be physically occupied. Yet it asked us to determine whether their physical occupation was within our province to condone. It knew the lands might be alienated. Yet it asked us to rule whether that alienation was proper. Manifestly, if occupation and alienation, *per se*, were inconsistent as a matter of law, there would be nothing on which we could rule. The fact that we are making this determination at all is total proof that there is more to be answered than these simple questions whether the land of the Tuscarora will be occupied or alienated.

If possible alienation of the lands does not *ipso facto* require a finding of inconsistency or interference, *a fortiori*, the presence of positive showing that to alienate the land will further that purpose of the

reservation will argue strongly for it, all other factors under the Act being favorable, as they are here.

We must discard the simple fact of potential alienation as evidence of inconsistence or interference. Something more must appear. We search the record in vain for any. In fact, the record contains only assertions by counsel and others that it would be patently inconsistent for the reservoir and the Indians to occupy the land at the same time. There is plainly misdirected emphasis on occupation of specific land as the basis of inconsistence. Then there is the contention that the *amount* of land taken, measured as a proportion of the total, governs.

We think a far more rational test is whether the alienation—whether of one-half of one per cent or ninety-nine per cent,—would be inconsistent or would interfere with the purpose of the reservation. On this point, the record made out by the Tuscarora is fatally deficient. There simply is no positive showing that alienation of these lands, if accompanied by and done pursuant to, appropriate conditions will be inconsistent or interfere with the reservation's purpose. Rather it appears that appropriate conditions are possible.

The language of the proviso in Section 4(e) does not confine us to the issue whether the taking of land will be inconsistent or not. It directs us to determine whether the *license,* in its totality, will be inconsistent. The license contains much more than the authority to take land. The same proviso directs that the license, "shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation."

The record does show that if the alienation is through condemnation under Section 21, the appropriate Court will fix the compensation to be paid to the Indians. In addition, as the Second Circuit points out, the Secretary of the Interior or the Tuscarora may purchase substitute lands if sufficient funds are made available. Moreover, by the terms of the offers made by Power Authority, swamps would be drained, roads built, and other improvements made on the remaining lands.

It would be quite a simple thing to attach conditions to the license that would assure to the Tuscarora the continuation of the way of life which they have selected as their own. In fact, this proposed purchase of land brings to the Tuscarora an unprecedented opportunity to advance whatever way of life they had been following. Never before has such a chance come their way. And probably, never will it come again.

If it is land that they want, then land they can get. And better land, drained, improved and laced with roads. In fact we are told that options on virtually identical amounts of land have actually been obtained. We filed our motion for additional time in this cause on January 16 because of the pendency of negotiations respecting the acquisition of reservation lands. As all parties were aware, including ourselves, these negotiations were based, among other things, on the availability of substitute lands for use of the Tuscarora.

If it is improved farming facilities, homes, schools, health facilities they want, these are obtainable. Or if it is merely the security of knowing that an asset, in the form of land, is held in their tribal name, this too can be had.

These or many similar advantages, as may be suggested by the Secretary of the Interior and the Tribe

itself, may easily be inserted in this license as reasonable conditions to the permission to occupy these reserved lands. Certainly any lawful action that offers to the Tuscarora a chance to advance its tribal well-being and more fully to provide for those members of the Tribe who are yet unborn can hardly be said to be inconsistent or to interfere with the end for which the reservation was created. As we have seen and as Counsel for the Tribe has conceded, this purpose is to enable the Indians to live peacefully and harmoniously.

As long as the means are at our disposal to advance the end for which the reservation was created we should take advantage of them. The conditioning power inherent in our licensing authority is ample to do so.

The next, inevitable and only remaining conclusion is that the license will not be inconsistent with or interfere with it.

We ought to say so to the District of Columbia Circuit, require the Power Authority to meet the terms we find necessary to further the purpose of the Tuscarora Nation, as Power Authority has offered, and permit them both to go about their businesses.

WILLIAM R. CONNOLE,
FREDERICK STUECK,
Commissioners.

United States of America

Federal Power Commission

Before Commissioners Jerome K. Kuykendall, Chairman; Frederick Stueck, William R. Connole, Arthur Kline and John B. Hussey

Project No. 2216

IN THE MATTER OF POWER AUTHORITY OF THE STATE OF NEW YORK

Opinion No. 317-A

Opinion and Order Denying Application for Rehearing

(Issued February 25, 1959)

There is before us an application for rehearing filed February 10, 1959, and supplement thereto February 11, 1959, by the Power Authority of the State of New York with respect to our Opinion No. 317 issued February 2, 1959, in which we found under Section 4(e) of the Federal Power Act that the license issued to the Power Authority insofar as it includes lands of the Tuscarora Indian Nation will interfere and will be inconsistent with the purpose for which such reservation was created or acquired. By permission the Tuscarora Nation filed an answer to the application for rehearing on February 17, 1959.

As set forth in our Opinion No. 317, the Power Authority was issued a license on January 30, 1958 (19 F.P.C. 186), in accordance with the Federal Power Act and Public Law 85-159, approved August 21, 1957 (71 Stat. 401). The license was to develop its Niagara Falls Project No. 2216 and involved as proposed, the use of about 1,383 acres of lands of the Tuscarora for a reservoir and incidental works. Our

Opinion No. 317 was issued upon remand by the United States Court of Appeals for the District of Columbia Circuit on November 14, 1958, to explore the possibility of making the finding required by Section 4(e) of the Federal Power Act, for the Court was of the opinion that Section 4(e) was applicable to the Tuscarora Lands as tribal lands under the definition of "reservations" in Section 3(2) of the Act.

In its application for rehearing the Power Authority contends that we have concluded erroneously that under Section 4(e) of the Act we may not license for reservoir purposes any land contained in a "reservation" within the meaning of the statute. This contention does not reflect the basis of our decision, which was that the particular power reservoir occupation of Indian land here involved would not meet the test of Section 4(e). We did not conclude that every occupation of reservation land was an interference with its purposes.

The Power Authority further contends in numerous particulars that we did not make correct or sufficiently detailed findings of fact. It contends that we did not make findings with respect to advantages accruing to the Tuscarora from the proposed transaction or with respect to the acquisition of equally desirable substitute lands for the Indians. This contention, we believe, is irrelevant, for we were properly concerned only with the purpose for which this Indian land was acquired, and were not directed to consider alternative proposals, which might or might not be sociologically desirable, but which might be consistent with the purpose of the present reservation. The Power Authority says that we should have made findings of fact on the purposes of the reservation, the ownership of the land, supervision by the United States and the legislative history of the 1957 Act which authorized

the project. We did make an essential finding of fact with regard to the purpose of the reservation, i.e. that it was acquired "for a homeland and a place to live and for farming and related uses". We were not required to make findings with respect to the other matters, inasmuch as we found that the reservoir use would be inconsistent with purposes found by us.

The Power Authority has also requested specific findings as to whether the licensing of certain smaller amounts of Indian land for the project would meet the requirements of Section 4(e), and as to whether or not any Tuscarora land is necessary for the project. Specifically, they refer to (1) 85.6 acres for a site on which transmission lines are being built; (2) 35 acres or any lesser amount for roads, and (3) 350 acres for reservoir purposes. The Commission is also requested to find whether licensing for reservoir purposes of any amount of Indian land less than 350 acres, or more than 350 acres but less than 1263 acres would interfere with the purposes of the reservation.

What the Power Authority appears to be attempting is an informal amendment of its license with an immediate decision upon it without the benefits of a hearing. In our opinion the Power Authority misconceives its remedy. If we made the findings requested we would deny other parties the opportunity to be heard upon the question whether a different project interferes with the reservation. Furthermore, there is no application for definite amendment to the license before us upon which we can pass judgment. A different size or location for the reservoir would greatly affect its relationship to the Indian lands, particularly as to the area and location of the land taken. We cannot predict what effect the taking might have on the Indian lands without knowing

precisely where they will be located, the type of land taken, and other relevant facts. With respect to the acreage for transmission lines and roads, we will, of course, consider these matters when they are properly brought before us.

The proper remedy for the Power Authority is to file an amendment to its license, with amended exhibits as necessary. In this way we can pass upon a definite proposal, and the rights of other parties will be protected. We would then be free to consider whether a taking of Indian lands in the amount of any lesser acreage would be consistent with the purpose of the reservation.

The Power Authority makes the further contention that Commissioner Hussey improperly participated in the decision since he did not hear oral argument because of illness. The majority consisted of Chairman Kuykendall and Commissioners Kline and Hussey while Commissioners Stueck and Connole dissented. There is no requirement of oral argument in this proceeding arising from the Administrative Procedure Act, the Federal Power Act or our Rules. Commissioner Hussey, of course, had before him and read the transcript of the oral argument. No rights of the applicant were abrogated. *Sisto* v. *C.A.B.*, 179 F. 2d 47, 53–54 (C.A.D.C.), *Eastland Co.* v. *F.C.C.*, 92 F. 2d 467 (C.A.D.C.) *certiorari denied* 302 U.S. 735.

The Court of Appeals remanded the case in order that we might explore the possibility of making a finding required by Section 4(e). Had Commissioner Hussey refrained from voting the finding desired by the Power Authority could not have been made.

While we have reached a conclusion in Opinion No. 317 contrary to the Power Authority and are denying it rehearing, we do not feel we are precluded from

contesting the interim holding of the Court of Appeals with respect to the applicability of Section 4(e) of the Power Act to these Tuscarora lands.

The Commission *finds:*

No new facts have been presented or alleged, and no new principles of law have been set forth in the application for rehearing as supplemented which either were not fully considered by the Commission before it entered its Opinion No. 317 on February 2, 1959, or having now been considered, warrant rehearing or modification of the aforesaid order.

The Commission *orders:*

The aforesaid application for rehearing as supplemented is denied.

By the Commission:

Commissioner Hussey concurring, filed a separate statement. Commissioners Stueck and Connole, concurring in part, dissenting in part, filed a separate statement.

/s/ J. H. Gutride,
JOSEPH H. GUTRIDE,
Secretary.

HUSSEY, Commissioner, *concurring:*

I concur in the order denying application for rehearing herein.

Eminent domain is a harsh and extraordinary remedy. All laws granting the right of eminent domain should be strictly construed, and the burden of proof in all such cases would rest on the one who seeks to exercise such rights. We are asked to make a finding under Section 4(e) of the Federal Power Act that the taking of 20% of the Indian lands, including 37 homes, would not interfere with the pur-

pose for which the reservation was created. Such a finding would be the basis for a license under the Federal Power Act, which in turn would be a predicate for the exercise of the right of eminent domain by the Power Authority, and the burden of proof of non-interference under Section 4(e) would be upon the Power Authority.

In my judgment the Power Authority simply has failed to sustain that burden.

One of the reasons urged for rehearing by the Power Authority was that we did not unequivocally make the finding that the lands which they sought to occupy are the only ones available for these particular purposes. I do not believe that the Power Authority has proven that the particular lands which they desire to occupy would be the only lands available for that purpose, either on or off the reservation.

An examination of Exhibit No. 315 mentioned in their Motion for Rehearing shows a swamp area within the reservation stated to contain approximately 350 acres. Instead of taking all of these swamp lands, the original project outlined in green on Exhibit 315 takes in only 100 acres of the swamp and substitutes highly improved lands and takes in other areas occupied by 37 homes. From an examination of this Exhibit, it would appear that the Power Authority could take all of the swamp lands and an additional 350 acres proposed in their amended application for rehearing, and some lands lying between these two areas, which would necessitate the removal of only one or two homes, and would cause minimum interference with the use of the reservation and would still make the project feasible.

Instead, the Power Authority has so designed this project to take in only a small amount of the swamp, and to take improved lands constituting 20% of the reservation and requiring the removal of 37 homes. This is exactly the type of situation that the Indian treaties and protective laws were designed to prevent.

In its Supplemental Petition for Rehearing the Power Authority now proposes to reduce the project and take only about 350 acres within the Indian reservation which would not cause the removal of any homes. In my judgment, this is a new project which would require a new hearing and a modified license, and it cannot be obtained through a motion for rehearing. However, if proper application were filed for such modified license, I see no reason that the matter could not be reopened and be reconsidered.

JOHN B. HUSSEY, *Commissioner.*

CONNOLE and STUECK, Commissioners, *concurring* in part, *dissenting* in part:

For reasons fully set out in our separate statement, filed with the Commission's Opinion No. 317 issued February 2, 1959, we dissent from so much of this order that fails to reconsider the earlier action of the Commission. Accordingly, we do not reach the question whether this Petition for Rehearing, as supplemented, amounts to an attempt by the Power Authority of the State of New York informally to amend its license without a hearing. It is clear, however, that since an affirmative finding under the proviso of Section 4(e) of the Federal Power Act could and should have been made by the Commission with respect to the previously proposed taking of a larger tract of Tuscarora land, we are necessarily bound to a similar finding with respect to the taking of a part of the same tract.

We concur that Commissioner Hussey's participation in this matter did not invalidate the order.

We concur also that the Commission is not precluded from contesting the interim holding of the Court of Appeals with respect to the applicability of Section 4(e) of the Power Act to these Tuscarora lands.

WILLIAM R. CONNOLE,
FREDERICK STUECK,
Commissioners.

STATUTES INVOLVED

1. Public Law 85–159, approved August 21, 1957, 71 Stat. 401, provides:

> AN ACT To authorize the construction of certain works of improvement in the Niagara River for power, and for other purposes
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That (a) the Federal Power Commission is hereby expressly authorized and directed to issue a license to the Power Authority of the State of New York for the construction and operation of a power project with capacity to utilize all of the United States share of the water of the Niagara River permitted to be used by international agreement.
>
> (b) The Federal Power Commission shall include among the licensing conditions, in addition to those deemed necessary and required under the terms of the Federal Power Act, the following:
>
> (1) In order to assure that at least 50 per centum of the project power shall be available for sale and distribution primarily for the benefit of the people as consumers, particularly domestic and rural consumers, to whom such power shall be made available at the lowest

rates reasonably possible and in such manner as to encourage the widest possible use, the licensee in disposing of 50 per centum of the project power shall give preference and priority to public bodies and nonprofit cooperatives within economic transmission distance. In any case in which project power subject to the preference provisions of this paragraph is sold to utility companies organized and administered for profit, the licensee shall make flexible arrangements and contracts providing for the withdrawal upon reasonable notice and fair terms of enough power to meet the reasonably foreseeable needs of the preference customers.

(2) The licensee shall make a reasonable portion of the project power subject to the preference provisions of paragraph (1) available for use within reasonable economic transmission distance in neighboring States, but this paragraph shall not be construed to require more than 20 per centum of the project power subject to such preference provisions to be made available for use in such States. The licensee shall cooperate with the appropriate agencies in such States to insure compliance with this requirement. In the event of disagreement between the licensee and the power-marketing agencies of any of such States, the Federal Power Commission may, after public hearings, determine and fix the applicable portion of power to be made available and the terms applicable thereto: *Provided,* That if any such State shall have designated a bargaining agency for the procurement of such power on behalf of such State, the licensee shall deal only with such agency in that State. The arrangements made by the licensee for the sale of power to or in such States shall include observance of the preferences in paragraph (1) of this subsection.

(3) The licensee shall contract, with the approval of the Governor of the State of New

York, pursuant to the procedure established by New York law, to sell to the licensee of Federal Power Commission project 16 for a period ending not later than the final maturity date of the bonds initially issued to finance the project works herein specifically authorized, four hundred and forty-five thousand kilowatts of the remaining project power, which is equivalent to the amount produced by project 16 prior to June 7, 1956, for resale generally to the industries which purchased power produced by project 16 prior to such date, or their successors, in order as nearly as possible to restore low power costs to such industries and for the same general purposes for which power from project 16 was utilized: *Provided,* That the licensee of project 16 consents to the surrender of its license at the completion of the construction of such project works upon terms agreed to by both licensees and approved by the Federal Power Commission which shall include the following: (a) the licensee of project 16 shall waive and release any claim for compensation or damages from the Power Authority of the State of New York or from the State of New York, except just compensation for tangible property and rights-of-way actually taken, and (b) without limiting the generality of the foregoing, the licensee of project 16 shall waive all claims to compensation or damages based upon loss of or damage to riparian rights, diversionary rights, or other rights relating to the diversion or use of water, whether founded on legislative grant or otherwise.

(4) The licensee shall, if available on reasonable terms and conditions, acquire by purchase or other agreement, the ownership or use of, or if unable to do so, construct such transmission lines as may be necessary to make the power and energy generated at the project available in wholesale quantities for sale on fair and reasonable terms and conditions to pri-

vately owned companies, to the preference customers enumerated in paragraph (1) of this subsection, and to the neighboring States in accordance with paragraph (2) of this subsection.

(5) In the event project power is sold to any purchaser for resale, contracts for such sale shall include adequate provisions for establishing resale rates, to be approved by the licensee, consistent with paragraphs (1) and (3) of this subsection.

(6) The licensee, in cooperation with the appropriate agency of the State of New York which is concerned with the development of parks in such State, may construct a scenic drive and park on the American side of the Niagara River, near the Niagara Falls, pursuant to a plan the general outlines of which shall be approved by the Federal Power Commission; and the cost of such drive and park shall be considered a part of the cost of the power project and part of the licensee's net investment in said project: *Provided,* That the maximum part of the cost of such drive and park to be borne by the power project and to be considered a part of the licensee's net investment shall not exceed $15,000,000.

(7) The licensee shall pay to the United States and include in its net investment in the project herein authorized the United States share of the cost of the construction of the remedial works, including engineering and economic investigations, undertaken in accordance with article II of the treaty between the United States of America and Canada concerning uses of the waters of the Niagara River signed February 27, 1950, whenever such remedial works are constructed.

SEC. 2. The license issued under the terms of this Act shall be granted in conformance with Rules of Practice and Procedure of the Federal Power Commission, but in the event of any con-

flict, the provisions of this Act shall govern in respect of the project herein authorized.

* * * * *

2. The pertinent provisions of the Federal Power Act, 49 Stat. 838, as amended, 16 U.S.C. 791a, *et seq.*, are as follows:

SEC. 3. The words defined in this section shall have the following meanings for purposes of this Act, to wit:

(1) "public lands" means such lands and interest in lands owned by the United States as are subject to private appropriation and disposal under public land laws. It shall not include "reservations", as hereinafter defined;

(2) "reservations" means national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks;

* * * * *

SEC. 4. The Commission is hereby authorized and empowered—

* * * * *

(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which

Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided,* That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation: * * *

* * * * *

SEC. 10. All licenses issued under this Part shall be on the following conditions:

(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

* * * * *

(e) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of this Part; for recompensing it for the use, occupancy, and enjoy-

ment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as herein provided is reached, and in fixing such charges the Commission shall seek to avoid increasing the price to the consumers of power by such charges, and any such charges may be adjusted from time to time by the Commission as conditions may require: *Provided,* That when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the Commission shall, subject to the approval of the Secretary of the Interior in the case of such dams or structures in reclamation projects and, in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands as provided in section 16 of the Act of June 18, 1934 (48 Stat. 984), fix a reasonable annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter upon notice and opportunity for hearing: * * *

* * * * *

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. [redacted]66

IN THE

Supreme Court of the United States

OCTOBER TERM 1958

POWER AUTHORITY OF THE STATE OF NEW YORK,
Petitioner,

v.

TUSCARORA INDIAN NATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

THOMAS F. MOORE, JR.,
10 Columbus Circle,
New York 19, New York,
Attorney for Petitioner.

SAMUEL I. ROSENMAN,
FREDERIC P. LEE,
JOHN R. DAVISON,
SCOTT LILLY,
of Counsel.

May 12, 1959

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IN THE

Supreme Court of the United States.

OCTOBER TERM 1958

No. ------

POWER AUTHORITY OF THE STATE OF NEW YORK,
Petitioner,

v.

TUSCARORA INDIAN NATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case March 24, 1959. Petition for certiorari has also been filed by the Federal Power Commission and is pending. A certified copy of the transcript of the record in the case has been filed by the Federal Power Commission.

Citations to Opinion Below

The opinion of the Court of Appeals for the District of Columbia Circuit dated November 14, 1958 and its order of March 24, 1959, are not yet reported. Copies are set forth in the Appendix to the petition for certiorari filed by the Federal Power Commission at pages 25-37.

Jurisdiction

A Memorandum Opinion was issued by the District of Columbia Court of Appeals November 14, 1958. Petitions for reconsideration of interlocutory holdings contained therein were denied without opinion and the judgment of the court entered on March 24, 1959. On motion of the Federal Power Commission, stay of the issuance of the court's opinion and judgment in lieu of mandate was granted April 17, 1959. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1) and § 313(b) of the Federal Power Act.

Questions Presented

The following questions are presented:

1. Does Tuscarora land in which the United States owns no interest constitute part of the public lands and reservations of the United States within the meaning of § 4(e) of the Federal Power Act?

2. Assuming *arguendo* that the Tuscarora reservation is a "reservation" of the United States within the meaning of § 4(e) of the Federal Power Act, was the requirement for a finding under the first proviso of § 4(e) superseded by the provision of the Niagara Redevelopment Act (Public Law 85-159; 71 Stat. 401; 16 U. S. C. §§ 836, 836a) directing that a license be issued to the Authority for a project to utilize all water of Niagara River available under international agreement?

3. Did the District of Columbia Court of Appeals usurp an administrative function in directing the Commission to amend its licensing order "to exclude the power" of the Authority as licensee to condemn Tuscarora lands?

4. May Tuscarora relitigate in the District of Columbia Court of Appeals questions decided by the Court of Appeals for the Second Circuit in a proceeding (i) brought by Tuscarora in a forum of its own choice prior to institution of

review proceedings in the District of Columbia Circuit and (ii) progressed to judgment in a Second Circuit District Court before the District of Columbia Court of Appeals obtained jurisdiction through the filing by the Federal Power Commission of a transcript of its proceedings?

Statutes Involved

The statutes involved are set forth in the Appendix to the petition for certiorari of the Federal Power Commission.

Statement

Petitioner is the licensee of the Federal Power Commission for construction of the Niagara Power Project. It wishes to present additional facts not contained in the petition for certiorari filed by the Commission with respect to the related litigation in the Second Circuit Court of Appeals, and to point out the legal dilemma in which it finds itself in connection with transmission lines already built on Tuscarora land.

Tuscarora on April 18, 1958, instituted a proceeding in a District Court in the Second Circuit to enjoin the appropriation of Tuscarora land by the Authority and for a declaratory judgment that neither New York State nor the Authority can acquire any Tuscarora land by any method. A judgment adverse to Tuscarora was rendered June 24, 1958. *Tuscarora Nation* v. *Power Authority*, 164 F. Supp. 107 (W. D. N. Y., 1958). The review petition in the present case was filed by Tuscarora in the District of Columbia Court of Appeals on May 16, 1958 and the Power Commission's transcript of record transmitted to that Court June 25, 1958. Not until then did the District of Columbia Court acquire exclusive jurisdiction. (Federal Power Act, § 313(b)).

Tuscarora on June 30, 1958 filed notice of appeal from the District Court judgment to the Second Circuit Court of

Appeals. That Court on July 24, 1958, affirmed the District Court judgment insofar as it held that the Authority had the right to condemn Tuscarora land. *Tuscarora Nation of Indians* v. *Power Authority of the State of New York*, 257 F. 2d 885, cert. den. 358 U. S. 841. The Court held that the Authority as a licensee of the Commission (which was directed by the Niagara Development Act to issue a license to the Authority) is authorized to exercise the right of eminent domain according to the procedures specified in § 21 of the Federal Power Act, but that New York State which had taken steps to appropriate the land on behalf of the Authority had no inherent power to acquire Tuscarora land and that appropriation under New York State statutes was not a procedure conforming with § 21 of the Federal Power Act. Certiorari, sought by Tuscarora, was denied by this Court on October 13, 1958 (358 U. S. 841).

New York State appealed September 3, 1958 from so much of the judgment as denied that the State has a sovereign right of eminent domain over Indian land and denied that appropriation in the name of the State on behalf of its agency the Authority conforms to Section 21 of the Federal Power Act. That appeal is still pending in this Court.

The Authority, on July 29, 1958, promptly following the judgment of the Second Circuit Court of Appeals, instituted a proceeding in the United States District Court for the Western District of New York, for condemnation of the 1,383 acres of Tuscarora land required for construction of the project as licensed. On September 15, 1958 the District Court authorized the Authority to take possession of 85.6 acres for construction of transmission lines and the Authority has already built such lines. After denial of certiorari by this Court, the District Court authorized the Authority to take possession of the remaining Tuscarora land necessary for the project as licensed except within 200 feet of dwellings located on it. The Authority has deposited with the District Court security of $2,000,000 in cash.

Reasons For Granting The Writ

A. The Court Below Has Erroneously Decided Important Questions of Federal Law Which Should Be Settled By This Court.

Section 4(e) of the Federal Power Act authorizes the Federal Power Commission to issue licenses (1) for the development of power with respect to bodies of water over which Congress has jurisdiction under the Commerce Clause, (2) upon any part of the public lands and reservations of the United States and (3) for the purpose of utilizing surplus water from government dams. This authorization is followed by a proviso that licenses within any such reservation, i.e., a reservation of the United States, shall be issued only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired and upon conditions deemed necessary by the Secretary of the department under which the reservation falls. Whether the Tuscarora reservation is a reservation of the United States within the meaning of that proviso and whether, in any event, § 4(e) is inapplicable because it is superseded by the Niagara Redevelopment Act, are important questions of Federal law which have not been, but should be, settled by this Court.

(1) Tuscarora Land is Not Part of a Reservation of the United States Within the Meaning of Section 4(e).

The word "reservations" as used in the findings proviso of § 4(e) immediately following the authorization to issue licenses on the "public lands and reservations of the United States" obviously has the same meaning in the proviso as it has a few lines above. For the findings proviso to apply the reservation must be one that is "a part of the public lands and reservations *of the United States*". [emphasis supplied].

Section 3(2) of the Federal Power Act defines "reservations" as meaning "national forests, tribal lands embraced within Indian reservations, military reservations, and *other* land and interests in lands *owned by the United States*, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks;" [emphasis supplied].

The Tuscarora, not the United States, own the lands in the Tuscarora reservation. The Court below, however, concluded that, in any event, "this reservation is one in which the United States has an interest". It found this interest principally in the doctrine of guardianship of the United States over Indians. The "interests in lands" contemplated by § 3(2) is a property interest, not the interest of a guardian, which cannot be "owned by the United States". Further, as the record shows (T. 7220-3; 7234-5; 8331-44), the Tuscarora land, unlike many Indian reservations, is not land withdrawn, reserved or withheld from private appropriation and disposal under the public land laws, nor does it fall under the supervision of any department of the United States Government, as is necessary to make the finding proviso of Section 4(e) applicable (T. 8278-9; 8185-96; 6187-98; 6724-7).

(2) Section 4(e) of the Federal Power Act is Inapplicable Because the License Was Issued Under the Authority of the Niagara Redevelopment Act.

The Niagara Redevelopment Act provides that "the Federal Power Commission is expressly authorized and directed to issue a license to the Power Authority" for the Niagara power project. The license so issued is subject to certain conditions (not here relevant) specified in that Act in addition to conditions deemed necessary and

required under the terms of the Federal Power Act. The "conditions" of that Act are set forth in § 10, not in § 4(e). The first proviso of § 4(e) requiring findings is not one of the conditions of the Act but a mere limitation upon the power to issue a license when the authority for that issuance is to be found in § 4(e). Here the authority for issuance is found in the Niagara Redevelopment Act and the findings proviso of § 4(e) is, therefore, inapplicable.

B. The Court Below Has Departed From The Accepted And Usual Course of Judicial Proceedings.

(1) THE JUDGMENT OF THE COURT BELOW IS A USURPATION OF CONGRESSIONAL AND ADMINISTRATIVE AUTHORITY.

The judgment of the Court remanded the case

> "... to the Federal Power Commission with instructions to amend its licensing order so as to exclude specifically the power of the said Power Authority to condemn the said lands of the Tuscarora Indians for reservoir purposes."

The Commission's order does not give the power to condemn. That power is one given by Congress by § 21 of the Federal Power Act to licensees of the Commission and the Second Circuit Court of Appeals specifically held the licensee had such power with respect to Tuscarora land. The Commission has no statutory authority to deprive a licensee of a power that Congress gives the licensee, the existence of which under the circumstances prevailing had already been judically confirmed. Furthermore, even if the Commission had any such power, the judgment of the Court below would be a usurpation of administrative authority directly contrary to the holding of this Court in *Federal Power Commission* v. *Idaho Power Co.*, 344 U. S. 17 (1952).

This departure by the Court below from the accepted and usual course of judicial proceedings calls for an exercise of this Court's power of supervision.

(2) THE COURT BELOW HAS PERMITTED TUSCARORA TO RELITIGATE BEFORE IT QUESTIONS DECIDED BY THE SECOND CIRCUIT COURT OF APPEALS, AND HAS ENTERED AN ORDER WHICH EXPLICITLY CONTRADICTS AND IN PRACTICAL EFFECT NULLIFIES THE EARLIER JUDGMENT OF THE SECOND CIRCUIT AND PLACES THE LICENSEE AND THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK IN A LEGAL DILEMMA WITH RESPECT TO THE CONDEMNATION OF TUSCARORA LAND, INCLUDING THAT UPON WHICH TRANSMISSION LINES HAVE ALREADY BEEN BUILT.

The Second Circuit Court of Appeals held (and this Court denied certiorari) that the Authority has the right as a licensee to exercise the power of eminent domain with respect to Tuscarora land, including land needed for transmission lines, for the project. That Court found, in the Niagara Redevelopment Act, Congressional consent to the exercise of such power. The District of Columbia Court of Appeals permitted this question to be relitigated and expressly found Congress did not consent to the taking of Indian lands through the Niagara Redevelopment Act, but did so only through § 4(e) of the Federal Power Act. The result of this holding, according to the Court, is that Commission findings under the first proviso of § 4(e) are a prerequisite to licensing a project to include Tuscarora land.

Since the Commission was unable to make the § 4(e) finding with respect to the 1,383 acres of Tuscarora land sought, the Authority is in the anomalous position of having had the Second Circuit Court of Appeals hold that it has the right to condemn the land but having the District of Columbia Court of Appeals hold that the Commission cannot license the use of the land. Further, the practical effect of the District of Columbia Court of Appeal's decision is to nullify the action of a District Court in another circuit authorizing the Authority to take possession of Tuscarora lands, including 85.6 acres for transmission lines already constructed, and to put into a state of con-

fusion the condemnation proceedings pending in that court. The District of Columbia Court of Appeals, in its order of March 24, did not specifically refer to the land for the transmission lines but only to lands to be used for reservoir purposes, but its November 14 opinion states, and Tuscarora contend, that no Tuscarora land can be used for any project purpose, unless a § 4(e) finding is made. If the Commission in the future were to make a 4(e) finding to the effect that the licensing of 85.6 acres of Tuscarora land for transmission line purposes would not interfere and is not inconsistent with the purpose for which the Tuscarora reservation was established, a legal dilemma would nevertheless result. This is so because if Tuscarora land constitutes part of a reservation of the United States within the meaning of § 4(e), it also does so within the meaning of § 10(e) and compensation for the use of the land must take the form of annual rental payments to the United States in an amount fixed by the Commission. On the other hand, if the judgment of the Second Circuit is correct and the Authority has the right to condemn the land, compensation is fixed by the District Court in the condemnation proceeding under the Fifth Amendment.

Tacoma v. *Taxpayers of Tacoma*, 357 U. S. 320 (1958) is not applicable. The facts there are the reverse of those here. There the decision of the Court of Appeals having exclusive jurisdiction to review the Commission order had become *res judicata* prior to the collateral proceeding. The Supreme Court was careful to point out that exclusive jurisdiction of "all objections to the order, to the license it directs to be issued, and to the legal competence of the licensee to execute its terms" arises "upon judicial review of the Commission's Order", not before. Here the question of Congress' having consented to the use of Tuscarora land for the Niagara Power Project was *res judicata* before the Court of Appeals for the District of Columbia Circuit acquired jurisdiction by the Commission's filing a transcript of its proceedings.

The appeal taken by the State of New York to this Court in No. 386 presents the question as to whether the State has inherent power of eminent domain over Indian land within its borders for public purposes—a power which it has exercised for 175 years. It also presents the question of whether the State's appropriation procedure is a valid exercise of the power of eminent domain under § 21 of the Federal Power Act. These questions should be disposed of by this Court at the same time it disposes of this case.

Conclusion

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

THOMAS F. MOORE, JR.,
10 Columbus Circle,
New York 19, New York,
Attorney for Petitioner.

SAMUEL I. ROSENMAN,
FREDERIC P. LEE,
JOHN R. DAVISON,
SCOTT LILLY,
Of Counsel.

May 12, 1959.

FILE COPY

Brief of the
Respondent
in opposition

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. [redacted] 63

FEDERAL POWER COMMISSION, *Petitioner*,

v.

TUSCARORA INDIAN NATION, *Respondent*.

No. [redacted] 66

POWER AUTHORITY OF THE STATE OF NEW YORK,
Petitioner,

v.

TUSCARORA INDIAN NATION, *Respondent*.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE RESPONDENT IN OPPOSITION

ARTHUR LAZARUS, JR.
1700 K Street, N. W.
Washington 6, D. C.
Attorney for Respondent.

Of Counsel:

EUGENE GRESSMAN
1700 K Street, N. W.
Washington 6, D. C.

June 10, 1959.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 911

FEDERAL POWER COMMISSION, *Petitioner,*

v.

TUSCARORA INDIAN NATION, *Respondent.*

No. 921

POWER AUTHORITY OF THE STATE OF NEW YORK, *Petitioner,*

v.

TUSCARORA INDIAN NATION, *Respondent.*

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE RESPONDENT IN OPPOSITION

OPINION BELOW

The memorandum opinion of the Court of Appeals for the District of Columbia Circuit, issued on November 14, 1958, is reported at 265 F. 2d 338. That court's final order, dated March 24, 1959, is reported at 265 F. 2d 338, 344.

QUESTIONS PRESENTED

1. Whether the specific statutory restrictions in 25 U.S.C. § 177 and § 233 upon the alienation of Indian tribal lands and the specific protections in 16 U.S.C. § 797(e) against the indiscriminate licensing of Indian tribal lands have in any way been superseded or modified by Public Law 85-159, 71 Stat. 401, a general statute which, without describing the location or character of the project facilities, merely authorizes the construction of a power project and does not mention either Indians or their property.

2. Whether the Tuscarora Reservation is to be excepted from the well-established rule that federal protections apply to Indian lands generally and thus is to be excluded from the benefits of the proviso in Section 4(e) of the Federal Power Act solely because the Tuscarora Nation holds fee title to its tribal lands, even though the United States still retains the power to control the alienation of those lands and maintains a guardianship relation to the Nation.

3. Whether the Court of Appeals, having determined that a particular finding was essential to the validity of a license and having been advised by the Federal Power Commission after extensive hearings that such a finding could not be made, was compelled to remand this matter to the Commission for further consideration rather than ordering the Commission to amend the license accordingly.

STATUTES INVOLVED

In addition to the statutes cited in the Appendix of the petition in No. 911, pp. 56-62, the following statutes also are involved:

R.S. § 2116, 25 U.S.C. § 177:

> "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. * * * "

Act of September 13, 1950, 25 U.S.C. § 233:

> "The courts of the State of New York under the laws of such State shall have jurisdiction in civil actions and proceedings between Indians or between one or more Indians and any other person or persons to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings, as now or hereafter defined by the laws of such State: * * * *And provided further*, That nothing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands within any Indian reservation in the State of New York: * * *."

STATEMENT

The relevant facts, in chronological order, are as follows:

1. In 1950, the United States and Canada entered into a treaty establishing the amount of water each nation may divert from the Niagara River for power purposes. 1 U.S.T. 694.

2. By the Act of August 21, 1957, Public Law 85-159, 71 Stat. 401, Congress directed the Federal Power Commission "to issue a license to the Power Authority of the State of New York for the construction and operation of a power project with capacity to utilize all of the United States share of the water of the Niagara

River permitted to be used by international agreement." In this statute Congress further directed the Commission to impose certain specified conditions on the license "in addition to those deemed necessary and required under the terms of the Federal Power Act." Congress, however, did not designate the location of the power project, describe the nature of the project works or otherwise approve any particular engineering plan for power development.[1] Moreover, Congress in Public Law 85-159 did not refer to the Tuscarora Indian Nation or the Tuscarora Reservation. Indeed, the legislative history of this 1957 statute is devoid of the slightest indication that Congress or any of its committees knew or even suspected that Indian land ultimately might be desired in construction of the Niagara Project.

3. On January 30, 1958, after hearings, the Federal Power Commission issued a license to the New York Power Authority, over the protest of respondent, the Tuscarora Indian Nation, which had intervened in the proceeding and had argued against the proposed use of approximately 1,000 acres within its Reservation for a water storage reservoir. Respondent's objection to this project facility was based in part upon the licensee's lack of legal authority to acquire Indian lands without the express consent of Congress. The Commission declined to pass upon that question on the ground that "other lands are available for reservoir use if the Applicant [Power Authority] is unable to ac-

[1] Actually, given the fact that the amount of Tuscarora land sought repeatedly changed prior to April 15, 1958, the Power Authority's own concept of the project could not have become final until almost a year after Congress acted.

quire the Indian lands, although alternative lands may be more expensive." R. 5842.

4. In denying the Tuscarora Nation's petition for rehearing, the Commission on March 21, 1958, again refused to decide whether the Power Authority lawfully could acquire Indian lands, ruling that this issue was "a question to be resolved by a court of competent jurisdiction." R. 5879. The Commission further held that respondent's property was not part of a "reservation" within the meaning of Section 4(e) of the Federal Power Act, and hence need not be made the subject of a finding by the Commission as to whether the license would "interfere or be inconsistent with the purpose for which such reservation was created or acquired." R. 5880.

5. On May 16, 1958, less than 60 days after the denial of the rehearing application, respondent filed in the United States Court of Appeals for the District of Columbia Circuit a petition for review of the Commission's order of January 30, 1958, pursuant to Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b). The District of Columbia Court thereby acquired "exclusive jurisdiction to affirm, modify or set aside such order in whole or in part." *Ibid.*

6. In the meantime, on March 21, 1958, the Power Authority of the State of New York filed a petition in the Supreme Court of the State of New York for Niagara County to condemn 1,300.35 acres of land belonging to the Tuscarora Nation for use in the Niagara Project. On April 15, 1958, however, the Power Authority wholly abandoned this judicial proceeding and, purportedly acting pursuant to a newly-adopted state law, attempted to appropriate over 1383 acres within the

Tuscarora Reservation by the mere filing of a map in the office of the State Superintendent of Public Works.

7. Faced with an imminent appropriation of its property under state law before the District of Columbia court could determine the validity of the basic license, the respondent filed a complaint in the United States District Court for the Southern District of New York on April 18, 1958, seeking, *inter alia*, a declaratory judgment to the effect that the Power Authority had no right to acquire lands belonging to the respondent without the express consent of the United States and a permanent injunction prohibiting the Power Authority from acquiring or attempting to acquire by appropriation, condemnation or otherwise lands belonging to the respondent in the absence of such consent. A temporary restraining order to the latter effect and further prohibiting the Power Authority from entering the Tuscarora Reservation, with certain exceptions, was granted by the court. The case then was transferred to the United States District Court for the Western District of New York. *Tuscarora Nation of Indians* v. *Power Authority of the State of New York*, 161 F. Supp. 702 (S.D.N.Y., 1958).

8. On June 24, 1958, following a hearing, the District Court for the Western District of New York dissolved the temporary restraining order, denied the motion for a permanent injunction and dismissed the complaint. *Tuscarora Nation of Indians* v. *Power Authority of the State of New York*, 164 F. Supp. 107 (W.D. N.Y., 1958). Immediately thereafter, respondent prosecuted an appeal to the United States Court of Appeals for the Second Circuit, which reinstated the stay previously in effect, with minor modifications, pending a final decision.

9. On July 24, 1958, the Court of Appeals for the Second Circuit reversed the judgment below insofar as the District Court had dismissed the complaint and thereby had blocked the Tuscarora Nation from any relief by way of a declaration of rights. Specifically, the Court of Appeals held that the United States, by virtue of 25 U.S.C. § 177 and § 233, had retained paramount authority to control the alienation of Indian tribal lands in the State of New York, although, of course, these protective statutes were subordinate to the Federal Government's own right of eminent domain. Since the appropriation proceedings instituted by the Power Authority under New York law did not stem from or otherwise involve the exercise of any Federal condemnation power, these proceedings were vacated and annulled.[2] *Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d 885 (C.A. 2, 1958).

10. The Court of Appeals for the Second Circuit further ruled, however, that, if the Commission license were valid—an issue which concededly was still pending before the District of Columbia court—then the Power Authority could exercise a Federal right of eminent domain with respect to the Tuscarora Reserva-

[2] This aspect of the Court of Appeals ruling, dealing with the inapplicability of the state appropriation procedure, is the subject of an appeal still pending in this Court filed by the New York Superintendent of Public Works. *Johnson* v. *Tuscarora Nation of Indians*, No. 386, Oct. Term, 1958. On July 27, 1958, however, the Power Authority abandoned the state appropriation procedure and instituted a condemnation suit in the United States District Court for the Western District of New York. *Power Authority of the State of New York* v. *1383.55 Acres of Land, et al.*, Civil Action No. 7934 (W.D. N.Y.). In view of this action, respondent herein has filed a suggestion of mootness in No. 386.

tion through regular condemnation proceedings. In support of this conclusion, the court cited not only Section 21 of the Federal Power Act, 16 U.S.C. § 814, but also Public Law 85-159, 71 Stat. 401, the 1957 act directing the issuance of a license to the Power Authority for the Niagara Project. As to the latter statute, the court said that Congressional permission for the taking of respondent's land could be found by inference "from the nature of the project and its proximity to the Reservation or from the impracticability of constructing it without taking a portion of the Tuscarora Reservation." 257 F. 2d at 893.

11. On September 8, 1958, Mr. Justice Harlan stayed the execution and enforcement of the judgment of the Court of Appeals for the Second Circuit, with one exception not here relevant, conditioned upon the filing of a petition for a writ of certiorari by the Tuscarora Nation on or before September 19, 1958. *Tuscarora Nation of Indians* v. *Power Authority*, 79 Sup. Ct. 4 (1958).

12. On September 19, 1958, the Tuscarora Nation duly filed a petition for a writ of certiorari, requesting interim relief from the impact of the Second Circuit decision until the District of Columbia Court could determine the validity of the license and asserting that the Second Circuit decision raised a novel and important question as to the extent to which a general statute which does not mention an Indian tribe or its lands can be said to express a Congressional intent to lift specific federal protections against the alienation of such lands. *Tuscarora Nation of Indians* v. *Power Authority of the State of New York*, No. 384, Oct. Term, 1958. This petition was denied on October 13, 1958. 358 U.S. 841. But since the filing of the peti-

tions in the instant cases, the Tuscarora Nation has filed a motion for leave to file a petition for rehearing as to the denial of certiorari in No. 384. That motion, which is presently pending before this Court, suggests that it would be appropriate to grant certiorari, limited to the question involving the interpretation of Public Law 85-159, 71 Stat. 401, if the Court grants certiorari in either or both of the instant cases.

13. On November 14, 1958, the Court of Appeals for the District of Columbia Circuit, after an expedited hearing, issued a memorandum opinion which is the basis for the petitions in the instant cases. *Tuscarora Indian Nation* v. *Federal Power Commission*, 265 F. 2d 338 (C.A.D.C., 1958). The court there held (a) that the United States, by virtue of 25 U.S.C. §§ 177, 233, controls the alienation of lands within the Tuscarora Reservation and that these lands cannot be taken by the Power Authority for reservoir purposes without the consent of the United States, (b) that such consent is not to be found in the 1957 statute authorizing the issuance of a license to the Power Authority, Public Law 85-159, 71 Stat. 401, (c) that the 1957 statute obliged the Commission in licensing the Power Authority to adhere to all conditions required by the Federal Power Act, including the proviso in Section 4(e) that projects may be located within Indian reservations "only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired", and (d) that the Commission thus could not issue a license for the construction of a reservoir on Tuscarora lands unless it made the finding required by this proviso in Section 4(e). Accordingly, the case was remanded to the Commission "that it may explore

the possibility of making that finding" and the court retained jurisdiction of the cause pending receipt from the Commission of notice of its action pursuant to the limited remand. The Commission was given fifteen days during which to respond.

14. On November 17, 1958, the Commission issued a Notice of Further Hearing "upon the questions presented and for the purposes set forth in Section VII" of the November 14 opinion of the Court of Appeals, i.e., on the possibility of making the required Section 4(e) finding. 23 Fed. Reg. 9101. That hearing commenced on November 24, but became so protracted and covered such a host of issues beyond what was specified in Section VII of the court opinion that the Commission was forced to obtain numerous extensions of time in which to report its action back to the Court of Appeals.

15. Finally, on February 2, 1959, the Commission, after consideration of the exhaustive record, the detailed written briefs and the lengthy oral argument, determined that "the license issued herein insofar as it includes lands of the Tuscarora Indian Nation will interfere and will be inconsistent with the purpose for which such reservation was created or acquired." Pet., No. 911, p. 41. In other words, the Commission concluded that the finding which the Court of Appeals had found essential as a condition precedent to a valid grant of a license on Indian lands could not be made. On February 25, the Commission denied the Power Authority's application for a rehearing of this decision. Pet., No. 911, p. 49. The Commission's holding that a Section 4(e) finding could not be made in this case never has been appealed and, therefore, is final and not before this Court.

16. On March 24, 1959, the Court of Appeals denied all motions for reconsideration of its memorandum opinion of November 14, 1958, and entered a final order approving the license issued to the Power Authority for the Niagara Project "except in so far as it would authorize the condemnation of Tuscarora Indian tribal lands for reservoir purposes." The court further ordered "that this case be remanded to the Commission with instructions to amend its licensing order so as to exclude specifically the power of the said Power Authority to condemn the said lands of the Tuscarora Indians for reservoir purposes."

17. In the meantime, on March 2, 1959, the Power Authority filed with the Commission an application for an amended license which requests permission to construct a storage reservoir wholly outside the Tuscarora Reservation. In that application the Power Authority states that it "cannot afford to await the outcome of further litigation, but must proceed with an amendment to the license and construction of the reservoir [off Tuscarora land] without further delay." The Commission has given official notice of a hearing on this application. 24 Fed. Reg. 1711.

ARGUMENT

The decision of the Court of Appeals for the District of Columbia Circuit is so eminently correct and so devoid of issues of an important or recurring nature as to warrant the denial of the petitions for writs of certiorari in both No. 911 and No. 921. The major grounds for refusing review of the judgment below may be summarized as follows:

(1) The Court of Appeals in this case has done no more that apply to a particular set of facts the canons

of statutory construction, repeatedly announced and implemented by this Court, that federal protections over and restrictions on Indian lands shall not be affected by general legislation unless Congress clearly manifests a contrary intent, and that the laws relating to Indians shall be liberally construed in favor of the Indians. Petitioners herein have pointed to no valid reason why these beneficent and time-honored principles, so integral to the guardianship of the United States over Indian tribes, should be reviewed or reversed. Similarly, petitioners have shown no valid reason why the Tuscarora Reservation should be excepted from the rules of law governing Indian lands generally or, even if such an exception were arguable, why an aberration relating to one reservation in one state should be worthy of consideration by this Court.

(2) The alleged conflict between the court below and the Court of Appeals for the Second Circuit over the interpretation of Public Law 85-159, 71 Stat. 401, has been resolved in such an authoritative fashion by the District of Columbia court in the exercise of its exclusive jurisdiction over the matter as to drain the Second Circuit decision on that issue of all force and effect and to deprive the conflict of current life. Moreover, even if a true conflict exists, the same question cannot possibly arise in litigation involving other parties so that any resolution of differing views by this Court would be only of parochial significance.

(3) The Niagara Power Project is truly an enterprise of national importance. The record in this case, though, shows that Tuscarora lands are not now and never were essential to that project. The inclusion or exclusion of respondent's property, therefore, does not itself present an issue of national importance.

With respect to statutory construction, the decision below properly is bottomed on a recognition that the United States always has retained the power to govern and control the territory reserved and held by Indian tribes for their permanent use and occupancy. *Worcester* v. *Georgia*, 6 Pet. (U.S.) 515 (1832); *The Kansas Indians*, 5 Wall. (U.S.) 737 (1867); *Creek County* v. *Seber*, 318 U.S. 705 (1943). This paramount federal power over Indian lands long has been codified by Congress, the key statute in this case (25 U.S.C. § 177, Rev. Stat. § 2116) providing that no purchase, grant, lease or other conveyance of lands from any Indian nation shall be valid unless made by treaty or convention with, or under the auspices of, the Federal Government. In 1950, when transferring civil jurisdiction over Indian reservations in New York from the United States to the State (25 U.S.C. § 233, 64 Stat. 845), Congress carefully retained exclusive federal power over the alienation of Indian tribal lands.

Both the court below and the Court of Appeals for the Second Circuit acknowledged that the foregoing statutes dictate that the consent of the United States must be obtained before any alienation of Tuscarora land can be permitted, whether by way of condemnation or otherwise. Such has been the consistent viewpoint of the Department of the Interior and the Department of Justice.[3] And, significantly, neither

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[3] In an Opinion dated May 4, 1900, Assistant Attorney General Willis Van Devanter, later an Associate Justice of this Court, ruled that 25 U.S.C. § 177 barred the Secretary of the Interior from approving a lease on the Tuscarora Reservation in the absence of authority from Congress. R. 5323-4. As recently as July 9, 1958, Elmer F. Bennett, then Solicitor and now Undersecretary of the Interior Department, expressed the view that 25 U.S.C. § 233, 64 Stat. 845, preserved the "applicability of R.S. Sec. 2116, 25 U.S.C. 177 to Indian tribal lands in New York." R. 5328-9.

petitioner in the instant cases even mentions, let alone disputes, this paramount authority of the United States over respondent's property and the necessity for some form of express consent by the United States before these lands may be condemned or licensed for use by the Power Authority.

The correctness of the decision below stands out plainly in this setting of paramount federal protections over Indian lands and the need for express consent to their alienation. All that the Court of Appeals had done here is to insist upon adherence to the foregoing basic doctrines and to apply recognized principles of statutory interpretation in determining whether and, if so, the extent to which Congress has authorized the taking of these particular Tuscarora tribal lands. In following this course, the court has neither announced a new principle of law nor created any precedent necessarily applicable to any statutory attempt to condemn the tribal lands of another Indian nation. See, for example, *Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U.S. 641 (1890).

To recapitulate, the court in this case simply and properly decided that laws designed to protect Indian tribes in the occupancy of their lands—such as Sections 177 and 233 of Title 25, and Section 797(e) of Title 16, of the United States Code—are to be interpreted broadly so as to give the fullest possible protection to the Indian beneficiaries. *Choate* v. *Trapp*, 224 U.S. 665, 675 (1912); *Jones* v. *Meehan*, 175 U.S. 1, 10-11 (1899). The court further observed that any laws claimed to be in derogation of such protection must be strictly construed and limited to the precise bounds of what Congress has clearly stated by way of consent to the alienation of Indian lands. More

specifically, the court recognized that general acts of Congress which, as in the case of Public Law 85-159, do not mention Indian tribes or their lands cannot be held applicable to them "unless so expressed as to clearly manifest an intention to include them." *Elk v. Wilkins*, 112 U.S. 94 (1884). And, with respect to the impact of the Federal Power Act, the court concluded that the protections accorded tribal lands within Indian reservations under Section 4(e), 16 U.S.C. § 797(e), must be fully honored.[4]

This case is significant, therefore, solely as an example of a correct application of accepted principles of statutory interpretation to a particular and non-recurring fact situation. As such, the case does not merit full consideration and disposition by this Court.

To contend that this case is not worthy of further review, of course, is not to deny the importance of the Niagara Project. The obvious public interest in utilizing available water power, however, does not inject into every case growing out of the manifold legal problems created by the project the elements of importance which alone warrant the exercise of this Court's certiorari jurisdiction. Within the scope of the vast Niagara Project can arise many judicial determinations, of which the instant one is an example, which are contrary to the position advanced by the licensee or the United States, but which obviously are correct and lacking in the significance so necessary to this Court's discretionary review.

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[4] Petitioners are in the uncomfortable position of urging that the Tuscarora Reservation is within the scope of the Federal Power Act to the extent of losing the protections of 25 U.S.C. § 177, but not to the extent of being entitled to the protections of Section 4(e).

Hence the importance of the case from the certiorari standpoint is in no way enhanced by the Solicitor General's speculation (Pet., No. 911, p. 11), unsupported by the record,[5] that the decision below may result in reducing "the dependable capacity of the project by one-sixth, a loss of 300,000 kilowatts of capacity." The undeniable fact is that as of January 30, 1958, when the Commission issued the license to the Power Authority without regard to the pertinent provisions of the Federal Power Act respecting Indian reservations, the Commission found that (R. 5842):

> "[. . . other lands are available for reservoir use if the Applicant is unable to acquire the Indian lands, although alternative lands may be more expensive."

In other words, the Power Authority had a choice, in 1957-8 as well as now, of selecting various alternative lands which still would permit a reservoir large enough in area to maintain the original projected

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[5] In holding on February 2, 1959, that the proposed storage reservoir would be inconsistent with the purpose for which the Tuscarora Reservation was created, the Commission also commented that the Power Authority's inability to use Indian lands would result in a reduction in the capacity of the project. Pet., No. 911, p. 40. In addition to being sheer dicta, this statement relates to a matter outside of the District of Columbia court's mandate on remand and beyond the scope of the Commission's own Notice of Hearing (see pp. 9-10, *supra*), and no evidence relating thereto legitimately is in the record. Moreover, the Commission was not speaking of facts existing on January 30, 1958, but of a situation which might exist in 1959, after the Power Authority had proceeded for more than a year to construct the project on and adjacent to the Tuscarora Reservation in complete disregard of respondent's rights.

kilowatt capacity of the project.[6] The Power Authority's *voluntary* determination first to insist upon Tuscarora land and then to seek a smaller reservoir if Tuscarora land cannot be acquired is a reflection of its own intransigence rather than of the importance of the decision below. Nor does the added cost of the alternative lands lend significance to the case. As the court below noted (Pet., No. 911, p. 35):

> "We fail to find anywhere an inclination of the Congress to save costs to its sole licensee for this enormous power project at the expense of Indians living on an Indian reservation."

In short, this case involves nothing more than an attempt by petitioners to ignore or misconstrue the historic statutory safeguards against indiscriminate alienation of Indian tribal lands in order to save a few dollars. Such a raid on the Tuscarora Reservation cannot be sanctioned. As this Court has reiterated many times, *United States* v. *Kagama*, 118 U.S. 375, 383-4 (1886):

> "These Indian Tribes *are* the wards of the Nation. They are communities *dependent* on the United States. . . . Because of the local ill feeling,

[6] The Commission reiterated on February 2, 1959, its earlier conclusion that "it would be physically possible to relocate the pumped-storage reservoir so as to eliminate the Indian lands. . . ." Pet., No. 911, p. 39; see also, concurring opinion of Commissioner Hussey in denying petition for rehearing, February 25, 1959, Pet., No. 911, p. 54. The Power Authority's application for amendment of license, filed with the Commission on March 2, 1959, calls for a smaller reservoir which, without using any alternative land, would make up most of the claimed loss in capacity through higher dikes. Presumably as much or more than the original kilowatt capacity could be obtained if some or all of the alternative land also were taken.

> the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court whenever the question has arisen."

Against this background, the specific issues which petitioners seek to raise appear, and can be disposed of as, undeserving of further consideration.

A. The Conflict as to Public Law 85-159

As the opinion below fully demonstrates, Congress in no way consented to or authorized the taking of Tuscarora lands through enactment of Public Law 85-159, 71 Stat. 401. This statute in very general terms directed the Commission to issue a license to the Power Authority to construct a power project utilizing all of the United States' share of the Niagara River water. Not a word appears in the statute with reference to Indian lands or with reference to a storage reservoir or other project facilities at any particular location.

Furthermore, there is not a single word in the legislative history of the 1957 act indicating that even the remotest possibility of a reservoir encompassing Indian lands was called to the attention of the legislative committees or the Houses of Congress.[7] The

[7] "There is no mention of Indian land in the committee reports, the debates or the directive statute; the Indians do not appear to have testified at the hearings; and in the plan considered by Congress there was no apparent necessity for the taking of Indian land." Note, 72 HARV. L. REV. 1372, 1373-4 (1959).

reservoir, its location, its size and form, and the many problems connected with locating it on any particular site were not the concern of Congress,[8] but rather were matters which remained to be worked out within the framework of the Federal Power Act.[9]

To construe such general legislation, either from its language or from its necessary implications, as constituting the specific consent required of Congress to the alienation of Indian lands is to pervert all standards of statutory construction and to blind oneself to the plain meaning and implication of clearly written language. Such a construction, moreover, does violence to the established rule that statutes affecting Indian tribes are to be interpreted, whenever possible, "in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and

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[8] The Solicitor General relies heavily (Pet., No. 911, pp. 15-16) upon a report of the Power Authority, dated January 28, 1957, as showing the nature of the Niagara Project. Aside from the fact that this document admittedly does not refer to the Tuscarora Nation or the Tuscarora Reservation, the report apparently also was not made a part of the record before any Congressional committee. The report, for example, is not listed as an exhibit in the table of contents and, as a study of the printed text reveals, is nowhere made a part of the official transcript of the hearings published by the Senate Committee on Public Works. Hearings before a Subcommittee of the Senate Committee on Public Works, 85th Cong., 1st Sess., on S. 512 and S. 1037, dated April 10-13, 1957. The House Committee on Public Works did not hold any hearings during 1957 on bills relating to the Niagara Project. H. Rep. No. 862, 85th Cong., 1st Sess., p. 3.

[9] This was a statute which by its very generality permitted the licensee to test the situation and, if it discovered determined resistance or legal impediments to a proposed site, "to abandon the proposed undertaking and seek its water supplies in some other direction." *New York* v. *Pine*, 185 U.S. 93, 98 (1902).

good faith." *Carpenter* v. *Shaw*, 280 U.S. 363, 367 (1930).

The fact that the Court of Appeals for the Second Circuit concluded, contrary to the decision below, that Public Law 85-159 does constitute the necessary Congressional consent to the taking of Tuscarora land does not establish a live conflict worthy of this Court's resolution. The Second Circuit ruling on this issue was contrary to the statutory scheme of review of matters affecting licenses under the Federal Power Act and should never have been made. The ruling was entirely gratuitous, being outside the scope of the issues presented by the parties. In addition, a mere reading of the Second Circuit opinion discloses that the court simply assumed, but did not decide, the validity of the license. The court necessarily was limited, by virtue of the pending review proceedings in the District of Columbia court, to a determination that *if* the license were valid, the licensee then could condemn the land pursuant to the authority granted in Public Law 85-159. But the difficulty with this reasoning was that the validity of the license depended in part upon the interpretation to be accorded Public Law 85-159. And that was an issue solely within the jurisdiction of the District of Columbia court.

Indeed, as events have proved, the ruling of the Second Circuit as to Public Law 85-159 has become of no force or effect. By virtue of the express provisions of Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b), the filing of the appeal in the District of Columbia court gave that tribunal "exclusive jurisdiction to affirm, modify or set aside" the license. See opinion of Mr. Justice Harlan on the stay application, *Tuscarora Nation of Indians* v. *Power Authority*, 79

Sup. Ct. 4, 6 (1958); *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 334-37 (1958). The very purpose of giving such exclusiveness to the jurisdiction of the court below was to avoid conflicting decisions in the courts of appeals and to give controlling force to the determination of the reviewing court. See Note, 72 HARV. L. REV. 1372, 1374 (1959). And because the court below has interpreted Public Law 85-159 in the necessary course of exercising its exclusive jurisdiction to determine the validity of the license, any contrary determination by the Second Circuit on issues within that exclusive jurisdiction is a nullity.

In short, the Power Authority cannot now rely on the Second Circuit's ruling on Public Law 85-159 to condemn the Tuscarora lands. The ruling of the court below has become controlling and decisive. There is thus no outstanding conflict of opinion for this Court to resolve.

Furthermore, even if a true conflict were in existence, this difference of opinion would not be worthy of review and resolution by this Court. In the first place, Public Law 85-159 relates to only one power project affecting one Indian reservation, so the question decided below cannot possibly arise in litigation involving other parties. Secondly, Public Law 85-159 directs that the license issued to the Power Authority shall be on the terms and conditions specified in the Federal Power Act, so that as noted hereinafter, regardless of the interpretation placed upon the 1957 statute, Tuscarora lands still are protected by Section 4(e), 16 U.S.C. § 797(e).

B. Issues Under the Federal Power Act

Petitioners herein have presented no valid reason why this Court should review the conclusion below that Tuscarora Reservation lands fall squarely within the scope of the protective proviso in Section 4(e) of the Federal Power Act. That conclusion follows inevitably from a proper reading of the word "reservation"—a word defined in Section 3(2) of the Act to include "tribal lands embraced within Indian reservations." As the court below observed, respondent's property "indubitably" comes within the usual meaning of that phrase.

Without any supporting statutory language, judicial precedent or administrative practice, petitioners contend that the term "reservation" encompasses only those Indian tribal lands in which the United States holds the fee or has some real property interest. Since the fee to the Tuscarora Reservation is held by the Tuscarora Nation, the petitioners assert that the lands may be taken without regard to the finding of consistency required by Section 4(e).[10]

The plain statutory words militate against such a result. Section 4(e) refers to "the public lands and

[10] Contrary to the Solicitor General's assertion (Pet., No. 911, p. 20), respondent never has accepted "the propriety and need for condemnation" or the lack of propriety in "an annual charge under Section 10(e)". Since the Tuscarora Reservation originally was purchased by the United States with tribal funds held in trust by the United States, the payment of an annual fee to the United States for the benefit of the Tuscarora Nation pursuant to Section 10(e) for any portion of respondent's lands used under a valid Commission license might very well be entirely appropriate. That question, however, has not been litigated and is not at issue in these proceedings since the court below held the Commission license invalid with respect to the Tuscarora Reservation.

reservations of the United States." The term "reservations of the United States" is in turn defined by Section 3(2) to include "national forests, *tribal lands embraced within Indian reservations;* military reservations, and other lands and *interests in land* owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws." [Emphasis added.]

The phrase "tribal lands embraced within Indian reservations" by itself admits of no distinctions or limitations in terms of the possessor of the fee. Indeed, the historic concept of an Indian reservation always has included all varieties of land title.[11] Secondly, the statutory setting in which this crucial phrase occurs gives no indication that Congress was here referring only to those reservations in which the United States has some proprietary interest. Section 3(2) is not so constructed or punctuated as to convey the thought that the phrase "owned by the United States [etc.]" must modify the term "tribal lands [etc.]."[12]

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[11] A variety of tenures has marked the holding of reservations by Indian tribes. Among the tenures are (1) fee simple ownership of land by the Indian tribe, (2) equitable ownership of the land by the Indian tribe, with fee title in the United States, (3) leasehold interest in the land by the Indian tribe, (4) rights of reverter, and (5) easements. See *Federal Indian Law* 591-2 (Dept. of Interior, 1958).

[12] The major flaw in petitioners' argument is that, of necessity, it claims too much. In other words, the reading of Section 3(2) advanced by the petitioners would combine the phrases "tribal lands embraced within Indian reservations" and "other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the

Lastly, Section 3(2), in reciting the various definitions of "reservation", speaks not only of *lands* owned by the United States, but also of *interests in lands* owned by the United States. In the instant case, of course, the United States owns an interest in the lands of the Tuscarora Reservation. By virtue of 25 U.S.C. § 177 and § 233, as confirmed by the uncontested rulings of the court below and the Second Circuit on this point, the United States possesses a restraint over the alienation of respondent's lands without federal consent. Such a restriction on alienation, coupled with the general guardianship relation of the United States to the Tuscarora Nation,[13] is a sufficient interest in the lands to enable the United States to sue to enforce the restriction. *Heckman* v. *United States*, 224 U.S. 413, 444-6 (1912). And that restriction and relationship make a sufficient property interest in these lands to bring the Tuscarora Reservation within the concept of "interests in lands owned by the United States."

More importantly, the restricted reading which the petitioners would give to the phrase "tribal lands embraced within Indian reservations" is contrary to 175 years of dealings between the Federal Government

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public land laws." Such a construction would virtually eliminate all Indian lands from the statutory definition of "reservations" since most Indian reservations, including the Warm Spring Reservation under consideration in *Federal Power Commission* v. *Oregon*, 349 U.S. 435 (1955), were established by treaty or agreement with the United States rather than under the "public land laws."

[13] The Solicitor General urges (Pet., No. 911, p. 22) that the "measure of guardianship protection" owed by the Federal Government to the Tuscarora Nation is merely the payment of "just compensation" for tribal property. This kind offer of a right guaranteed to all by the Constitution is something less than the high standard of fair dealings arising out of the guardianship relation which Congress and the courts traditionally have demanded.

and Indian tribes. The courts uniformly have ruled that federal protections apply to all lands of tribes recognized by the United States whether or not the Indians' title is derived from the Government and whether or not the Government has a "proprietary interest." *United States* v. *Candelaria*, 271 U.S. 432 (1926); *United States* v. *Sandoval*, 231 U.S. 28 (1913).[14] As stated by Judge Parker in *United States* v. *7,405.3 Acres of Land, etc.*, 97 F. 2d 417, 422 (C.A. 4, 1958):

> "The determinative fact is that the federal government has assumed towards them the same sort of guardianship that it exercises over other tribes of Indians, from which it results that their property becomes an instrumentality of that government for the accomplishment of a proper governmental purpose and may not be taken from them by contract, adverse possession, or otherwise without its consent."

No reason is advanced by petitioners why an exception to this uniform rule should be carved out of the

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[14] In Cohen, *Handbook of Federal Indian Law* (Govt. Print. Off., 4th ed., 1945), at p. 321, it is recited that "the decisions are uniform that a tribe holding land in fee simple is subject to exactly the same restraints upon alienation as any other tribe." Again at p. 309 it is noted that "even where the United States does not own the ultimate fee in the land of an Indian reservation, its relation of guardianship to the Indian tribe carries the power and duty of protecting the Indian possessory right against condemnation proceedings or other infringements by the state." The late Felix S. Cohen, the author of these statements, has been characterized by this Court as "an acknowledged expert in Indian law." *Squire* v. *Capoeman*, 351 U.S. 1, 8 (1956). Neither petitioner cites a single case contrary to the proposition that lands owned by Indians in fee simple are accorded exactly the same protections against alienation as lands held in trust by the Federal Government.

Federal Power Act. Section 4(e) was plainly designed to protect Indian tribes in the possession and occupancy of their reservations, absent some specific intent by Congress to take away such protection, to the extent that any proposed license would be inconsistent with or interfere with the purposes for which the reservation was created. The whole purpose of that protection is in no way dependent upon the precise title arrangement of the reservation land. And nothing that this Court said or held in *Federal Power Commission* v. *Oregon*, 349 U.S. 435 (1955), gives any support to the opposite conclusion.

But even if Section 4(e), or the definition of "reservations" in Section 3(2), were to be considered ambiguous, this Court repeatedly has ruled that "Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith." *Carpenter* v. *Shaw*, 280 U.S. 363, 367 (1930). See also *Squire* v. *Capoeman*, 351 U.S. 1, 6-7 (1956); *Choate* v. *Trapp*, 224 U.S. 665, 675 (1912); *Winters* v. *United States*, 207 U.S. 564, 576 (1908). A corollary canon of statutory construction is that treaties with Indian tribes and laws affecting Indians must be liberally construed for the benefit and protection of the Indians. *Jones* v. *Meehan*, 175 U.S. 1, 10-11 (1899); *United States* v. *Shoshone Tribe*, 304 U.S. 111, 116 (1938); *Tulee* v. *Washington*, 315 U.S. 681, 684-5 (1942). In light of these principles of law, Section 4(e) of the Federal Power Act cannot be construed as failing to give the Tuscarora Nation the benefits of the uncontested finding by the Power Commission that the Power Authority's license is inconsistent with the purpose for which the Tuscarora Reservation was established.

So clear are the language and purpose of Section 4(e), as construed and applied to this case by the court below, that further review by this Court is unnecessary.

C. The Procedural Issues

Several additional issues raised by the petitioners are equally without importance for purposes of this Court's certiorari jurisdiction.

1. The Solicitor General complains (Pet., No. 911, pp. 22-24) that the court below erred in remanding the case to the Commission with instructions to amend its order "so as to exclude specifically the power of the said Power Authority to condemn the said lands of the Tuscarora Indians for reservoir purposes." Quite plainly, however, the court below in no way invaded the area of discretion residing in the Commission. Having decided that the license could not validly cover any portion of the Tuscarora Reservation, the court below properly directed that the license be amended in such a way as to eliminate all impact upon the reservation.

The court's ruling on the merits did not leave room for the exercise of discretion by the Commission on the inclusion of respondent's lands within the Niagara Project. The Solicitor General, therefore, cannot and does not suggest that a different order on remand in any way would change the ultimate disposition of this case with respect to the Tuscarora Reservation, the only property here involved. Similarly, there was no need for the court below in its order on remand expressly to permit the Commission to consider alternative or smaller reservoir sites. Those issues then were and still are pending before the Commission on the

application for an amended license filed by the Power Authority.

In short, there was nothing for the Commission to reconsider on remand in light of the narrow holding and direction of the Court of Appeals. This case thus is entirely unlike *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20-21 (1952), where the lower court had tried to exercise an administrative function in its order.

2. The contention of the petitioner Power Authority (Pet., No. 921, pp. 8-9) that the court below erroneously permitted the question of Congressional consent to the taking of Tuscarora lands to be relitigated following the Second Circuit decision is wholly without merit. The principle of *res judicata* cannot conceivably apply to the proceedings below since the Commission was not a party to the Second Circuit case.[15] Moreover, the ruling of the Second Circuit on the question of Congressional consent is now pending before this Court on a motion for leave to file a petition for rehearing from the denial of certiorari. The Second Circuit ruling thus has not yet achieved complete finality in light of the special circumstances of this manifold litigation. And finally, this contention of the Power Authority completely ignores the statutory scheme of review established by the Federal Power Act wherein the court below—not the Second Circuit—has *exclusive* jurisdiction to decide all issues bearing upon the validity of the license. 16 U.S.C. § 825*l*(b);

[15] The Second Circuit, of course, also ventured no opinion on the basic issue decided below, the validity of the license issued by the Commission to the Power Authority with respect to the Tuscarora Reservation.

City of Tacoma v. *Taxpayers of Tacoma*, 357 U.S. 320, 334-37 (1958).

CONCLUSION

For the foregoing reasons, the petitions in both No. 911 and No. 921 should be denied. Respondent also calls the attention of the Court to the fact (see Pet., No. 911, p. 11, fn. 4) that the petitioner Power Authority has apparently abandoned its proposal to utilize Tuscarora Reservation lands for the reservoir and has filed an application with the Federal Power Commission for an amended license covering a redesigned reservoir entirely off Tuscarora Reservation lands. This application will result in making the present controversy entirely moot.

Respectfully submitted,

ARTHUR LAZARUS, JR.
1700 K Street, N. W.
Washington 6, D. C.
Attorney for Respondent.

Of Counsel:
EUGENE GRESSMAN
1700 K Street, N. W.
Washington 6, D. C.

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